IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

WASHINGTON COUNTY, NORTH CAROLINA and BEAUFORT COUNTY, NORTH CAROLINA,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF THE NAVY; GORDON R. ENGLAND, in his official capacity as Secretary of the Navy, and WAYNE ARNY, in his official capacity as Assistant Secretary of the Navy for Installations and Environment (Acting),
Defendants.

Civil No. 2:04-CV-3-BO(2)

THE NATIONAL AUDUBON SOCIETY, NORTH CAROLINA WILDLIFE FEDERATION, and DEFENDERS OF WILDLIFE,
Plaintiffs,
v.
DEPARTMENT OF THE NAVY; GORDON R. ENGLAND, Secretary of the Navy; WAYNE ARNY, Assistant Secretary of the Navy for Installations and Environment (Acting); C.S. PATTON, Brigadier General, U.S. Marine Corps, Commanding General, Marine Corps Air Station, Cherry Point,
Defendants.

Civil No. 2:04-CV-2-BO(2)

United States' Memorandum In Opposition to Plaintiffs' Motion for Summary Judgment

Defendants, the United States Navy, *et al.*, through the undersigned counsel, hereby file this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Plaintiffs'

Memorandum of Law in Support of Motion for Summary Judgment.

I. Introduction

Both parties have filed motions for summary judgment, and are now filing simultaneous responses. The procedural history of this case, as stated in the United States' Motion for Summary Judgment, filed on November 22, 2004, ("United States' Mtn. for S.J.") is incorporated here by reference and is well known to the Court; it will not be repeated here.[1] In sum, the Plaintiffs are challenging the Navy's decision to build an Outlying Landing Field ("OLF") in Washington County, North Carolina. The United States, in its Mtn. for S.J. set out a comprehensive summary of the facts demonstrating that the Navy complied fully with the National Environmental Policy Act ("NEPA") and the Coastal Zone Management Act ("CZMA").

Plaintiffs' NEPA and CZMA are brought pursuant to the Administrative Procedure Act ("APA"). In the context of judicial review of an agency's compliance with NEPA, the Court is charged with two tasks: (1) to determine whether or not the agency took a "hard look" at the potential environmental impact of the proposed action, and (2) to determine whether the conclusions reached by the agency were arbitrary and capricious. In their motion for summary judgment, Plaintiffs have not shown that the Navy failed to take a hard look or that the Navy's decisions were arbitrary and capricious. Therefore, this Court should uphold the Navy's decision and grant the United States summary judgment.

II. Argument

A. Consideration of Extra-Record Material

In its Mtn. for S.J., the United States set out the factual history of the process the Navy went through in evaluating the various options for homebasing the F/A-18 Super Hornet Aircraft

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[1] The United States also hereby incorporates by reference its previous arguments submitted in other filings in this matter as they relate to Plaintiffs' arguments.

on the East Coast of the United States. That history (as well as the statutory and regulatory background) is incorporated by reference here. In the Plaintiffs' cross-Motion for Summary Judgment, ("Pltfs' Mtn.") however, the Plaintiffs cited to material outside the Administrative Record ("AR") to support their arguments. The Navy has consistently objected to the use of this improper extra-record material. Plaintiffs brought this case under the APA and as a matter of law are entitled only to review of the AR supporting the Navy's decision. The United States filed a Motion to Strike this extra-record material at the preliminary injunction stage of this action, and during oral argument on the United States' Motion for Reconsideration, held on June 30, 2004, the Court made an informal ruling denying the United States' motion as it related to the Plaintiffs' request for injunctive relief. The United States is also filing contemporaneously with this Response, its opposition to the Plaintiffs' motion to supplement the AR with extra-record materials. For the reasons stated in both of the United States pleadings on this issue, the United States' objects to the Plaintiffs' request that the Court consider the extra-record materials the Plaintiffs have submitted (except to the limited extent that certain of these materials may be relevant on the issue of harm in consideration of Plaintiffs' request for a permanent injunction). If the Court decides to consider this extra-record material, it should also consider the extra-record material provided in rebuttal by the United States.

Among the improper extra-record material the Plaintiffs have asked this Court to consider is the October 7, 2004 deposition of Joseph Daniel Cecchini, the Navy's Project Manager for the Environmental Impact Statement ("EIS"). The Plaintiffs argue that Mr. Cecchini's deposition establishes that the Navy violated NEPA. In fact, the Plaintiffs have cited to this deposition extensively in their brief. However, the Plaintiffs' citations to Mr. Cecchini's deposition are selective and do not give a full or accurate representation of his testimony.[2] In addition, without

[2] The United States continues to assert that this Court should not consider this or extra-record evidence that Plaintiffs have submitted, which was not before the agency at the time it

waiving its right to continue to object to the use of this extra-record material, and without waiving its right to appeal any decision by this Court to consider it, the United States submits the following more complete description of the factual background of the NEPA process, as testified to by Mr. Cecchini, in rebuttal of the Plaintiffs' arguments. In order to demonstrate that Mr. Cecchini's statements are supported by the AR itself, the United States has inserted below, following the quotations from the depositions, the appropriate citations to the AR. To the extent, therefore, that the Court strikes the extra-record evidence submitted by the Plaintiffs, the United States asks that the Court consider only the AR citations set out below, along with the summary of the facts previously submitted by the United States.

In his deposition, Mr. Cecchini described what the Navy did even before issuing the Notice of Intent, which officially started the NEPA process:

> As I said, there was a lot of work that went into the EIS before we actually issued a Notice of Intent. We established criteria for home basing siting, and it was recognized early on that an OLF could be required to support some of the alternatives that we were going to potentially look at. Cecchini Deposition p. 31. AR 011551 to AR 011564.

He went on to explain how the process was an "iterative" one that continually considered new information, incorporated it into the process, and refined the process as it went along:

> Well, you have to understand, this is a very iterative process. It was a very

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rendered its decision challenged in this action. As explained in the United States' Response to Motion to Supplement, filed contemporaneously herewith, judicial review of an administrative action typically is confined to the record that was "before the agency at the time the initial decision was made." Fort Sumter Tours, Inc. v. Babbitt, 66 F.3d 1324, 1335-36 (4th Cir.1995) (*quoting* Lewis v. Babbitt, 998 F.2d 880, 882 (10th Cir. 1993) (*citing* Bar MK Ranches v. Yuetter, 994 F.2d 735, 738 (10th Cir. 1993). Indeed, in Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1024 (4th Cir. 1975), the Fourth Circuit ruled that, in reviewing agency action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." (*quoting* Camp v. Pitts, 411 U.S. 138, 142 (1973)("Judicial review under these standards is generally based on the administrative record that was before the agency at the time of its decision . . . .").

> methodical process as the OLF Siting Study outlines. It was a step by step, but at every step we reevaluated and we discussed. And we established very specific environmental criteria that we were using to help us winnow down our potential range of alternatives to consider to get us to what we felt was a reasonable – the reasonable alternatives to consider for OLFs. Cecchini Deposition p. 46. FEIS p. 2-62 to 2-70; *see e.g.*, AR 035976 to AR 035977 and AR 050313 to AR 050317.

As the process developed, there were naturally different opinions expressed among the participants in this process, both within and outside the Navy. The primary group which considered all of these various concerns was referred to by the Navy as the "Tiger Team."[3] Concerning this group's efforts, Mr. Cecchini said:

> Well, as I mentioned previously, this was a very complex process where we had a Tiger Team, if you will, a core group of people who helped prepare this document who met on many, many occasions, many hours. And there were many opportunities for us to sit down – when I say us, members of the group, to sit down and to discuss all the issues associated with this OLF. Cecchini Deposition pp. 81-82. FEIS Section 16 on p. 16-1 to 16-4; see *e.g.*, AR 056190 and AR 056277.

As the NEPA process progressed, and drafts of the Draft EIS ("DEIS") and Final EIS ("FEIS") were being circulated, there were again a variety of opinions within the Navy about how certain portions of the documents should be worded. Just as the decisions about acceptable locations of the OLF were subject to the "Tiger Team's" review, the precise wording of the documents was also subject to a team approach, including significant debate about how various issues should be described. Mr. Cecchini described this process as follows:

> The preparation of this EIS was not by me. It was done by teamwork. . . . And any time that we proposed new language or making changes to the book, it got vetted to the team for review and chop, and it was not uncommon to have 20 or 25 e-mails going back and forth to people suggesting changes to make it work, to read better. Cecchini Deposition p. 123. FEIS Section 16 on p. 16-1 to 16-4; *see*

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[3] The phrase "Tiger Team" used in this Response includes that group of persons that were brought together for their expertise to assist in the development and preparation of the Navy's EIS for the homebasing of the Super Hornets on the East Coast.

e.g., AR 056190 and AR 056277.

There were so many people involved in this process, and so many meetings and briefings growing out of this process that at one point, Mr. Cecchini apologized for not remembering exactly who was present at each briefing. He said, "it sounds bad, but there were literally so many briefings that were given, its hard to recall who was at exactly what briefing." Cecchini Deposition pp. 133-134. In describing the briefing that was given to Chief of Naval Operations ("CNO") and others toward the end of the process, Mr. Cecchini said:

> The – the main thing that I recall is that the briefing – the brief itself was very large, very detailed. It covered all topics in great detail, agonizing detail, and that the CNO and the Secretary of the Navy's office, Secretary of the Navy, asked a lot of questions about a lot of issues and we discussed them. Cecchini Deposition, p. 135. *see e.g.*, AR 061945 to AR 061946.

At one point in the deposition, Mr. Cecchini was asked by Plaintiff's counsel, "Would it be normal for you to – to try to get as many sources for information in order to be as accurate as you could be in writing something like this?" Mr. Cecchini responded, "Yes. I'm pretty anal and, yes, it would be normal for me to bother a lot of people." Cecchini Deposition p. 162. FEIS References Section 17 at p. 17-1 to 17-24. In fact, Mr. Cecchini went on to point out that in addition to the input he received from the Navy personnel in Norfolk, he received substantial input from others as well. He said, "Right, but I would like to point out that the team concept didn't stop in Norfolk. There were team members inside the beltway who may have chopped on this as well." Cecchini Deposition p. 169. FEIS p. 16-3 to 16-4

Not only did the "Tiger Team" consider information from the large number of commands within the Navy with relevant responsibilities, but it also considered information from numerous other interested citizens and citizens' groups, and conducted additional analysis, as necessary. Mr. Cecchini described some of this input as follows:

> Well, after we released the Draft EIS, we received a lot of feedback on the document, which in a NEPA sense is good. We got a lot of interest. And so we

> went through the comments and concerns, and one of the concerns raised by a number of different folks was the issue of BASH and Bird Aircraft Strike Hazard, BASH. While we had addressed BASH in the EIS, to – for all the different OLF sites, we decided that based on this input that we should probably look further into it to find out if there's anything we had missed in our analysis. Cecchini Deposition p. 234. AR 127168 to AR 127174 and AR 113903 to AR 113909.

Finally, Mr. Cecchini was asked in his deposition about what information the Navy took into account in deciding that even though the birds (particularly Snow Geese and other migratory water fowl) near the Washington County OLF site would "flush" when the planes approached, that the long term effects would probably be minimal. In particular, he was asked whether the Navy took into consideration the opinions of people from the Fish and Wildlife Service. He responded:

> A lot of information was taken into account in making our conclusions. Their concerns were definitely one factor that we considered in making our assessment of impacts and conclusions. . . . And so when we considered all of those factors, the Wildlife Refuge Managers' concern being very valid and something we took very seriously, but we also took a look inside our own Department of Defense and talked to our own Natural Resources Managers and talked to our own wildlife experts at Ecology & Environment and when we – when we balanced it on the – on all – on the table, we felt that the impacts would be minimal. Cecchini Deposition pp. 254-257. FEIS p. 12-120 to 12-123, and FEIS Section 17.

In conclusion, the evidence both directly from the AR and as summarized by Mr. Cecchini demonstrates conclusively that the Navy complied with NEPA by taking a "hard look" at the environmental issues in this case, and considered a full range of reasonable alternatives before making its decision to construct an OLF at Washington County, North Carolina.

B. Plaintiffs Have Failed to Demonstrate That The Navy's OLF Siting Decision Violates NEPA and The CZMA

The main thrust of the Plaintiffs' argument is summed up in the phrase that is repeated so often it has become the Plaintiffs' mantra: that the Navy's decision to dual site the Super Hornets at NAS Oceana and MCAS Cherry Point, and to construct an OLF at Washington County was

"reverse engineered to a predetermined and politically motivated objective." Pltfs' Mtn. at 14. In fact, twenty-five pages of their 70-page memo surrounds this issue. The problem for the Plaintiffs is that the facts simply do not support their assertions, which are based on isolated excerpts of selected e-mail exchanges between individuals who were not the Navy's ultimate decision-maker. As the AR reveals, the Navy's decision was not predetermined, it was not motivated by improper political considerations, and it was not "reverse engineered." To the contrary, the evidence in the comprehensive AR, which encompasses over 190,000 pages of documents and studies, demonstrates that the NEPA process was executed exactly as Congress intended – there was a free flow of information, concerns, and opinions among the various Navy personnel to insure that all viewpoints were considered before a decision was made. The process was an iterative one. The record clearly demonstrates that as information was obtained during this thirty-seven month process, the Navy processed it, integrated it into its analysis, and considered how it affected the Navy's proposed action and the human and natural environment. The Navy then fully explained its analysis in the FEIS, and Record of Decision ("ROD"), in accordance with the law.

Furthermore, the Navy sought input from a wide variety of sources both within the Navy and outside the Navy. It should come as no surprise that there would be discussion and debate among all participants - operators, planners, real estate experts, biologists, environmentalists, and elected officials (and their staff) as this process unfolded. Just as the legal process arrives at the truth through zealous presentation of facts and argument by opposing sides in the litigation, the NEPA process promotes the expression and consideration of opinions and comments by all interested parties before an agency acts. The fact that, on occasion, some Navy personnel used hyperbole in expressing their concerns merely shows how comfortable each participant was in airing his or her views freely throughout the process without fear of negative consequences.

This is precisely what NEPA mandates, and this is precisely what transpired in the course of the Navy's EIS.

In addition to their first contention, that the Navy did not adequately consider a full range of reasonable alternatives for siting an OLF, the Plaintiffs also complain of seven additional instances in which the Navy allegedly acted arbitrarily and capriciously. Plaintiffs also contend that the Navy: (1) minimized the impact of the OLF on migratory birds and the Pocosin Lakes National Wildlife Refuge ("NWR"), Pltfs' Mtn. at 40; (2) inappropriately minimized the risk of Bird-Aircraft Strike Hazard ("BASH"), Pltfs' Mtn. at 50; (3) failed to take a hard look at the cumulative impacts of the development of the OLF and the proposed MOAs, Pltfs' Mtn. at 56, (4) failed to provide adequate mitigation measures, Pltfs' Mtn. at 59; (5) used an inappropriate method to determine the presence of wetlands, Pltfs' Mtn. at 61; (6) inappropriately failed to prepare a Supplemental Environmental Impact Statement ("SEIS") to discuss impacts of "surge" operations, Pltfs' Mtn. at 62; and, (7) violated the CZMA by failing to make a consistency determination regarding the Beaufort County Land Use Plan, Pltfs' Mtn. at 64. As demonstrated by the United States in its Mtn. for S.J., and as explained in more detail below, the AR supports none of Plaintiffs' allegations. Rather, it reflects that the Navy accorded full and adequate consideration to all of these environmental matters and that its actions were hardly arbitrary and capricious.

While reasonable people may differ about the Navy's conclusions, NEPA, the CZMA and the APA all provide that the Court must uphold the Navy's decisions as long as they are not arbitrary and capricious. 5 U.S.C. § 706(2)(A), *see also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). The Navy fully complied with NEPA, the CZMA and the APA and its decision, set forth in the ROD, to construct and operate an OLF in Washington County should be upheld and the United States awarded summary judgment.

1. Plaintiffs Failed to Show That The Navy Inadequately Considered A Reasonable Range of Alternatives, and/or "Reverse Engineered" the Process to Reach a "Predetermined" and "Politically Motivated" Decision

In their Mtn. for S.J., Plaintiffs argue that the Navy "reverse engineered" its OLF decision "to a Predetermined and Politically Motivated Objective" and failed to consider a full range of alternatives. Pltfs' Mtn. at 14. As the United States now explains, none of Plaintiffs' allegations have substance.

NEPA requires that the agency consider a "reasonable range" of alternatives. Coalition for Responsible Regional Dev. v. Coleman, 555 F.2d 398, 400 (4th Cir. 1977). In developing a reasonable range of alternatives, the Navy was required to examine a range of alternatives that satisfied the underlying purpose and need of the proposed action. 40 C.F.R § 1502.14. NEPA provides the Navy the latitude to consider alternatives that meet the Navy's purpose and need, including alternatives that strike a balance between operational, environmental, economic and other concerns. An agency's discussion of alternatives will be upheld so long as alternatives are reasonable and the agency discusses them in reasonable detail. Coalition for Responsible Regional Dev., 555 F.2d at 400.

a. Plaintiffs' Contentions That The Split Siting Decision and the Location Decision for the OLF Were "Predetermined" Are Unsupported by the Record

In arguing that the Navy's OLF decision was pre-determined, Plaintiffs argue that both the split-siting and location components of that decision were, in effect, a foregone conclusion. Neither argument is supported by the record.

i. Plaintiffs Have Not Shown That the Split Siting Decision was "Predetermined"

It is ironic that Plaintiffs complain about the decision to "split site" the F/A-18 E/F (Super Hornets) at both NAS Oceana and MCAS Cherry Point, because, as the record shows FEIS p. 2-

71 to 2-73, this decision was made primarily because of environmental concerns.[4] It is no secret that there have been a substantial number of complaints about noise surrounding operations at both NAS Oceana and its outlying landing field, NALF Fentress. FEIS p. 1-11 to 1-12; and Appendix A, p. A-7 to A-13 and Table 1-3 p. A-26 to A-41. Noise was of particular concern for homebasing alternatives involving NAS Oceana, since the Super Hornets are louder than the aircraft they would replace. The Navy took this and other environmental issues into consideration, and weighed them along with operational, economic and other considerations in determining where to homebase the Super Hornets. 68 Fed. Reg. 53,358. Only after balancing all of these factors did the Navy conclude that it made sense to split site the Super Hornets between two bases – one in Virginia and one in North Carolina.

The Plaintiffs claim that there is no operational benefit to be derived from split siting the Super Hornets. While solely from an operational perspective, this statement is true, DEIS p. ES-7 and Sections 2.2.2.1 and 2.2.2.2 on p. 2-32, and FEIS Sections 2.2.2.1 and 2.2.2.2. on p. 2-32, it is irrelevant because it was environmental impacts and economic factors that primarily influenced the split siting for the Super Hornets. 68 Fed. Reg. 53,358. In its Notice of Intent ("NOI"), which began the EIS process, the Navy stated publicly that "splitting the squadrons between two bases" would not be precluded in the development of reasonable homebasing alternatives. 65 Fed. Reg. 39,373. As explained in the DEIS, "dual-siting would require some duplication of resources; however advantages regarding noise, population encroachment impacts and air quality mitigation would be realized." DEIS p. ES-7. Additionally, the split site alternative selected by the Navy maximizes the use of existing infrastructure, while achieving economies of scale in support, maintenance, and training. 68 Fed. Reg. 53,359. For these

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[4] The Navy's decision to split site the F/A-18 Super Hornets was the environmentally preferred homebasing alternative. 68 Fed. Reg. 53,354.

reasons, the Navy reasonably concluded that alternatives that included splitting the basing sites for the Super Hornets squadrons were appropriate and thus worthy of evaluation in the NEPA process.

Contrary to the Plaintiffs' assertion, Pltfs' Mtn. at 15, homebasing all 10 Super Hornet squadrons at one location was never identified as a "preferred alternative"[5] in the context of NEPA in either the DEIS or FEIS. DEIS p. 2-64 to 2-66 and FEIS p. 2-71. Case law makes clear, moreover, that there is nothing unusual or improper with an agency having an idea of what it would like to do prior to starting the NEPA process. "Under NEPA. . . it is often the case that an agency will have a preferred alternative, perhaps even a specific proposal, going into the EIS process." Citizens Concerned About Jet Noise, Inc., v. Dalton, 48 F. Supp 2d 582, 607 (E.D. Va. 1999); *see also* 40 C.F.R. §1502.2(g). At the beginning of the NEPA process, the Navy acknowledged that single siting the aircraft was preferable from a purely operational point of view. AR 011547, DEIS Section 2.2.2.1 and 2.2.2.2 at p. 2-32, FEIS Section 2.2.2.1 and 2.2.2.2 at p. 2-32. It is ironic that Plaintiffs would now complain that the Navy made a decision that considered environmental impacts as well as operational preferences. Far from proving that the NEPA process was an "exercise in form over substance" or a "subterfuge" (Pltfs' Mtn. at 14), the fact that the Navy made a decision that it had not originally anticipated proves the opposite – that the Navy considered environmental and economic factors before reaching its final decision about where to homebase the Super Hornets.

The Super Hornet EIS process began with the creation of a document that set forth the

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[5] "Preferred alternative" is a term of art under NEPA. An agency's "preferred alternative" is the alternative that an agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The Council on Environmental Quality ("CEQ") regulations require agencies to identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement. 40 C.F.R. §1502.14(e).

operational requirements for basing the Super Hornets. AR 176352. This internal Navy memo was intended, and served as, a "feeder" document for a more comprehensive development of homebasing alternatives. Admiral LaFleur, then serving as Deputy Commander in Chief, U.S. Atlantic Fleet, forwarded a memorandum containing the Atlantic Fleet's proposed list of homebasing alternatives to the Chief of Naval Operations. AR 011545 to AR 011566 That memorandum explained:

> A multi-level screening process was established to identify the range of reasonable alternatives that would best meet the operational requirements...[T]hree Navy/Marine Corps air stations have been identified as potential receiving sites: NAS Oceana,VA; MCAS Beaufort, SC; and MCAS Cherry Point, NC. . . The Navy's preferred alternative[6] is to site all the Atlantic Fleet F/A-18 E/F squadrons at one location . . . and if mitigation does not allow for single siting, two dual site alternatives.

AR 011547. However, the FEIS concluded that "[d]ual siting the Super Hornet squadron at two locations was considered the best option after single siting in terms of operational readiness, maintenance and logistic support, and synergy." FEIS p. 2-32. The DEIS and the FEIS make clear that all of these options were on the table. DEIS Section 2.2.3 at p. 2-33 to 2-3, FEIS Section 2.2.3 at p. 2-33 to 2-34.

The Plaintiffs' assertion that single siting at NAS Oceana was the Navy's "preferred alternative" is based on a point paper prepared by a Commander Brett Muilenburg. AR 173508 At the time this point paper was written, June 2001, the DEIS had not been written, much less published. An agency's preferred alternative is presented in the DEIS, not in the scoping process or other preliminary work in preparing the DEIS. 40 C.F.R.§ 1502.14. Commander Muilenburg was a technical advisor for military construction projects, working within a limited area of responsibility and with a relatively narrow perspective on the issues involved in the home basing

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[6] This statement of the preferred alternative was not made in the context of NEPA. *See* footnote 5, *supra.*

decision. This point paper clearly does not represent any decision on the Navy's part, but rather demonstrates the personal opinion of one of the members of the team. At the time of this dialogue, no preferred alternative had been identified. In fact, the DEIS was still being written. More significantly, in February 2002, the Tiger Team was still exploring dual siting alternatives, then limited to the alternative of 6/4 splitting of squadrons between NAS Oceana, MCAS Cherry Point and/or MCAS Beaufort. AR 073651 to AR 073674 and AR 068681 to AR 068710. Subsequently, Alternative 6 (8/2 split between NAS Oceana and MCAS Cherry Point, respectively) was added as a viable alternative based on the Navy's preference to co-locate squadrons assigned to the same carrier airwing and also to locate the Fleet Replacement Squadron ("FRS") with the greatest number of fleet squadrons. DEIS p. ES-7. *See* AR 084030 to AR 084098 ("Since last ESG [executive steering group] [22 February 2004, AR 068681 to AR 068710], ...Alternative 6 (FRS and 8 squadrons to NAS Oceana and 2 squadrons to MCAS Cherry Point) was added"). Id. at AR 084031 None of the single siting alternatives, including home basing all Super Hornets at NAS Oceana, was ever selected as the preferred alternative in the DEIS or FEIS. However, single siting the squadrons at NAS Oceana, MCAS Cherry Point, or MCAS Beaufort remained viable alternatives throughout the NEPA process and the potential environmental impacts involved with home basing the squadrons at a single location were thoroughly evaluated. FEIS Section 2.2.3 at p. 2-33 to 2-34 and FEIS Section 2.8 at p. 2-76 to 2--97. *See also* Section 4 at p. 4-1 to 4-106, Section 6 at p. 6-1 to 6-108, and Section 8 at p. 8-1 to 8-74.

Operational factors are obviously critically important, but if the operational factors were the only relevant consideration, there would not be a need for the NEPA process at all – the agency would simply do what is in its operational best interest. Congress, however, has mandated that agencies consider other factors before making a final decision. That is exactly

what the Navy did here. While, sometimes, the operational factors outweigh the environmental factors, at other times (including this case), the operational considerations become secondary to environmental and economic factors. As the FEIS and the ROD make clear, the environmental advantages associated with dual siting, *i.e.*, noise, air quality and population encroachment mitigation, were considered alongside operational needs, just as the NEPA process is designed to work. FEIS p. 2-30 to 2-71, 68 - Fed. Reg. 53,358 to 53,359.

ii. Plaintiffs Have Not Demonstrated That The OLF Siting Decision was "Predetermined"

Just as the Navy's decision concerning where to locate the Super Hornet aircraft was not "predetermined," neither was its decision concerning where to locate the OLF.[7] This fact is made clear from Plaintiffs' brief itself. As Plaintiffs admit in their recitation of facts, there was no mention of the Navy's need for an OLF in its NOI. Pltfs' Mtn. at 3. The significance of this admission cannot be overstated. There was no mention of an OLF in the NOI precisely because the Navy had not made the decision to build a new OLF anywhere, let alone in Washington County. It is true that before the NOI was issued, the Navy recognized that the home basing of Super Hornets potentially would require significant support infrastructure. AR 011546. It is also true that the Navy recognized that this infrastructure might possibly include an OLF. AR 010863 to AR 010870, AR 011560. However, it was not until the Navy was in the final stages of

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[7] The Navy decided to construct an OLF at Site C in Washington County because it was the environmentally preferred OLF alternative site. 68 Fed. Reg. 53,354. "Site C was the environmentally preferred OLF site alternative. The estimated population within the greater than 60 Day-night average sound level (DNL) noise zone is lower at Site C than at Sites A, B, E, and F and comparable to that of Site D. Construction of the OLF at Site C will not impact wetlands, threatened and endangered species, or cultural resources. While there would be some impacts to migratory waterfowl, these impacts are mitigable and would be minor. Surrounding land use is primarily agricultural and is considered compatible with aircraft operations."

developing the home basing alternatives that the Navy realized construction of a new OLF would be required to support several of the alternatives. DEIS 2-48, FEIS 2-60. Thus, far from being evidence of inappropriate conduct, as Plaintiffs claim, the Navy's evaluation of what would be needed to support several alternatives is a solid demonstration of the NEPA process working as it is supposed to work - a hard look into the implications of a proposed action will raise impacts, needs, and issues which are then dealt with as the analysis develops into a draft and then a final document - *i.e.,* precisely what happened here.

In this specific instance, home basing the majority of the squadrons either at MCAS Cherry Point or at MCAS Beaufort would require construction of a parallel runway or an OLF because of the number of FCLP operations needed by all or a majority of the fleet squadrons. DEIS p. ES-9, 2-50. It was only after the Navy confirmed that this potential requirement for an OLF was an actual requirement that it awarded a contract for an OLF Siting Study. AR 006585 to AR 006593. The Navy also realized that a new OLF to support Super Hornet squadrons home based at NAS Oceana would enhance operational flexibility, while providing important noise and population encroachment mitigation for citizens living around NAS Oceana and NALF Fentress. DEIS Section 2.2.2.2 at p. 2-32 to 2-33. It is unquestionably proper to consider legitimate environmental benefits when developing alternatives. Again, this demonstrates that the Navy was not working to any predetermined end, as Plaintiffs allege, but instead shows that the Navy followed the NEPA process exactly as Congress and the law intended.

Plaintiffs for some reason believe it significant that within four months of the NOI, Admiral Natter wrote a letter to the Hampton Roads community explaining that the Navy was exploring the development of an OLF "precisely because of community concerns about jet noise." Pltfs' Mtn. at 4. As discussed above, there is absolutely nothing improper about that statement. The reality is that reduction in environmental impacts around NAS Oceana, in

conjunction with the possibility of placing Super Hornets there, was one of several reasons the Navy was considering constructing an OLF. AR 011551 to AR 011564 at AR 011564. The Navy also recognized that in addition to the environmental considerations of noise and air quality, an OLF would provide operational flexibility. DEIS p. 2-42 While Admiral Natter's letter was written in October 2000, *before* the Navy's OLF Siting Study was completed and *before* the DEIS was published, environmental issues such as noise levels near NAS Oceana and NALF Fentress were well known. AR 017795; *see also* AR 006585 to AR 006593 (Scope of Work dated August 30, 2000). Therefore, Plaintiffs' suggestion that this letter somehow demonstrates improper motivations in the EIS process because it was written before the DEIS is utterly without merit.

The Plaintiffs' own brief fatally undermines their "pre-determination" argument by admitting that the DEIS identified not one, but two preferred locations for the OLF. Pltfs' Mtn. at 4. Clearly, the Navy cannot fairly be deemed to have reached any decision, predetermined or otherwise, to build an OLF at Washington County when the record shows that, as late as August 2002, it gave Craven County, North Carolina, equal consideration as a preferred OLF site. DEIS p. ES-3. Again, this is exactly the sort of hard look at alternatives and environmental decision-making that NEPA is designed to foster. Plaintiffs also assert evidence of "pre-determination" in what Plaintiffs allege was the Navy's disregard of the objections by the U.S. Fish and Wildlife Service ("F&WS") to locating an OLF at the Washington County site. What Plaintiffs fail to point out, however, is that the F&WS objected to <u>all</u> of the proposed OLF sites in North Carolina except Craven County. AR 064147 to AR 064153. For example, in its February 2002 letter, the F&WS' Raleigh Field Office vociferously objected to locating an OLF at the Open Grounds Farm site, stating that siting an OLF in Carteret County would impact 200 species of birds. <u>Id.</u> The Navy eventually dismissed the Open Grounds Farm site from further consideration in the

OLF Siting Study for operational reasons. Furthermore, F&WS did not submit any comments objecting to the selection of Washington County during the review period between the FEIS and the ROD.[8]

In addition, Plaintiffs argue that the elimination of the Carteret County (Open Grounds Farm) Site in some manner demonstrates that the Navy had already "predetermined" that the OLF would be in Washington County. Pltfs' Mtn. at 17. The facts, however, do not support this argument. As explained on page 11 of the United States' Mtn. for S.J., the Open Grounds Farm site was eliminated for operational reasons during the fourth stage of the OLF Siting Study. The minutes of the December 5, 2001 meeting (AR 050313 to AR 050317) spell out the pros and cons of the sites that were still being considered. That document concluded that based on

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[8] In an effort to shore up its weak case, Plaintiffs rely on material outside the AR, *i.e.*, correspondence from the Department of Interior ("DOI"). The Plaintiffs have cited to a November 25, 2003 letter from the DOI, of which the F&WS is a part, (which is dated almost three months after the ROD was executed - on September 3, 2003). Pltfs' Mtn. at 7. That letter contains information that directly conflicted with earlier positions taken by the F&WS. Specifically, contrary to what F&WS said in their February 2002 letter to the Navy, AR 064147 to AR 064153) the DOI, in this post-ROD letter, indicated that the Open Grounds Farm (Carteret County) Site should be further considered for an OLF site. This flip-flop prompted further dialogue between the Navy and DOI. The United States asserts that this information should not be considered by this Court, since it was is dated after the date of the ROD, or post-ROD, and was not (and could not have been) considered by the Navy as part of the decision-making process. *See* United States' Response to Motion to Supplement Record, filed contemporaneously herewith. However, if this Court is inclined to consider post-ROD information from the DOI submitted by Plaintiffs, the Court should also consider the letter from the Assistant Secretary for Fish and Wildlife and Parks of the Department of the Interior, dated February 24, 2004. Exhibit 18 to United States' Opposition to Plaintiffs' Motion for Preliminary Injunction ("United States' Opp. to P.I."). The final position of the DOI on the establishment of an OLF in Washington County is found in that letter to the Navy which states that, "the proposed project can be implemented in a manner that minimizes the impact to the areas natural resources and provides for the smooth and efficient operation of both the refuge and the OLF." To the extent that this Court is going to consider the post-ROD correspondence of the DOI, it should consider the final position of that Department.

comments from the pilots and others at that meeting, "Overall the operators though[t] this site was quite poor." AR 050315. That document went on to list some of the reasons the site was not good, including:

- Significant conflict with BT-9/11 bombing Range
- Direct conflict with nighttime Box GCA [Ground Controlled Approach] pattern and Bombing Range operation
- Conflict with Sea-SAR [search and rescue]
- 800-foot tower within 4 miles of airfield
- Not a long term option - only VFR [visual flight rules] FCLP
- Above 6000 foot holding pattern out of CP [Cherry Point]
- Altered runway cannot use prevailing winds and significantly impacts surrounding development

Id. After further examination of this site, the Navy decided to drop it from consideration because of these operational and safety reasons, and in accordance with NEPA, the Navy then provided a full and detailed explanation as to why Carteret County was eliminated from further consideration. DEIS 2-63 and FEIS 2-68. In particular, the Navy concluded that the Carteret County Site was unsafe for its pilots. The DEIS said, "This location would create an unacceptable safety risk for both FCLP and target operations. For this reason, this site was eliminated from further consideration." DEIS p. 2-63, FEIS p. 2-68; AR 050315.[9]

Plaintiffs further claim that the Navy refused data offered by F&WS to estimate waterfowl numbers. Pltfs' Mtn. at 7. Again, Plaintiffs get the facts wrong. The Navy used as much data as it could obtain from the F&WS to estimate waterfowl numbers at the Pocosin Lakes NWR. AR 064147 to AR 064153. The Navy verbally requested access to F&WS' entire data base (referred to on Page 7 of Pltfs' Mtn.) during both the December 2002 and January 2003 site visits to Washington County. The Navy never received that information during the EIS process -- it was not until after the ROD had been signed and published that F&WS provided

[9] As pointed out above, at the time of the ROD, this site was also considered by the F&WS to be unacceptable for environmental reasons as well.

additional data. Nevertheless, these data on waterfowl numbers were entirely consistent with data on waterfowl numbers the Navy used in its analysis and that are contained in the FEIS. FEIS p. 11-36

Plaintiffs also attempt to support their theory that the location of the OLF was "predetermined" by saying that the Navy only made one site visit to the Washington County Site to evaluate migratory birds. Pltfs' Mtn. at 9. This is simply untrue. The AR documents that there were three official Navy site visits conducted at Site C during the winter of 2002-2003. AR 117359 to AR 117360, AR 122192 to AR 122193, and AR 125648 to AR 125649. The first site visit occurred on December 2, 2002 by invitation of Mr. Joe Albea, a local conservationist. AR 117359 to AR 117360. The second site visit occurred on January 14 and 15, 2003, at which time the Navy conducted a two-day site evaluation. AR 122192 to AR 122193. The Navy's intentions in participating in this site visit were clear, as stated in a letter to Mr. Albea; "The Navy's goal during our 14-15 January meeting is to collect more information related to waterfowl/wildlife and BASH issues associated with the OLFs in eastern North Carolina.... Our ultimate goal is to ensure the Secretary of the Navy's office has the most accurate information available prior to making a final decision on basing the Super Hornet and the OLF." AR 122192 to 122193 and AR 120161 to AR 120163. During this two-day visit, the Navy met with representatives from the F&WS, North Carolina Wildlife Resources Commission, Audubon Society, Nature Conservancy, and Ducks Unlimited, among others. The information provided at this meeting was extremely beneficial to the Navy. AR 122192 to AR 122193. The third site visit was held at the OLF site in February 2003 to begin the Geo-Marine BASH study of all OLF sites and to review the BASH situation with the Navy's BASH Program Manager. AR 125648 to AR 125649. All in all, Navy natural resources experts spent four days at the Washington County OLF site in the winter of 2002-2003 evaluating waterfowl/wildlife and BASH issues. Id.

Moreover, in addition to these site visits, the Navy also studied the effects OLF operations would have on wildlife by conducting a review of scientific literature regarding aircraft noise effects on wildlife, analyzing existing military operations on various wildlife habitats, reviewing comments, and meeting with state and federal agencies responsible for protecting wildlife. FEIS, App B; *see* United States' Mtn. for S.J. at 42-51.

The AR therefore overwhelmingly demonstrates that the Navy never made a "predetermined" decision to place an OLF in Washington County. Rather, the Navy, pursuant to NEPA, reasonably considered a full range of alternatives, and settled on Washington County only after it considered all of the relevant factors.

b. Plaintiffs Have Not Established That Either the Split Siting Decision or the OLF Location Decision Was "Politically Motivated"

The second part of the Plaintiffs' three-part "mantra" is that the decisions to split site the F/A-18 Super Hornets at two bases and the selection of the Washington County OLF site were "politically motivated." Pltfs' Mtn. at 14-39. Once again, the Plaintiffs take isolated portions of the AR and extra-record material out of context to weave a story that is sensational but simply not true.

Plaintiffs cite an e-mail from one of the members of the Tiger Team, Commander David Sienicki as "proof" that these decisions were motivated by improper political considerations. Pltfs' Mtn. at 17. In that e-mail Commander Sienicki states his understanding of what the Navy's decision-maker, Assistant Secretary Johnson, was thinking. AR 140346. This e-mail does not establish that the Navy's decision was improperly motivated by political concerns. First, it reflects the opinion of one member of the EIS Tiger Team regarding the views of the decision-maker. Additionally, this e-mail is not limited to a discussion of political issues. It discusses a number of factors that need to be considered in the decision-making process including "operational flexibility," "important noise and encroachment mitigation," and "economic impact."

Far from establishing that the decision was "entirely motivated by politics" (Pltfs' Mtn. at 4), this e-mail demonstrates merely that Commander Sienicki was aware of the political realities of the situation, and took those realities into consideration along with all other factors in formulating his views and opinions contained in the correspondence.[10]

In any event, nothing in NEPA or other law suggests that decisions of such magnitude as the Super Hornet EIS -- affecting national security, potentially affecting hundreds of thousands of citizens in two states, and involving hundreds of millions of dollars -- should be made in a political vacuum. Very much to the contrary, NEPA requires environmental, operational, and fiscal impacts on the communities involved, noise levels, potential for disruption, and economic and social factors to be considered. 40 C.F.R. § 1505.2 (1992).

The evaluation of alternatives mandated by NEPA must include evaluation of reasonable alternative means to accomplish the general goal of an action. Coalition for Responsible Regional Dev. v. Coleman, 555 F.2d 398, 400 (4th Cir. 1977). Many of the factors enumerated above can be characterized as "political," yet they are clearly issues a decision maker can and should consider. *See* Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976). If one takes Plaintiffs' argument to its logical conclusion - that it is improper to consider issues raised by elected officials and their staffs - it would mean that the Navy was somehow barred from

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[10] It is clear from the Administrative Record that the Tiger Team, and Mr. Cecchini in particular, concluded that regardless of any political considerations, the OLF in Washington County made the most sense. In one e-mail, Mr. Cecchini rejects the suggestion that the Washington County site was being selected solely for political reasons. Despite the fact that the Virginia and North Carolina delegations had different opinions about where to locate the aircraft and the OLF, Mr. Cecchini said definitively that the Washington County location made the most sense, irrespective of these political considerations. He said, "I try to think of it this way: If there were no Virginia/NC border (i.e. it was all one state) would it make sense then to build an OLF? My answer keeps coming back to 'yes' . . . . [T]ake the borders out of the equation and it truly does make more sense." AR 120498. *See also* Cecchini Deposition pp. 15, 23 - 24 and 84.

considering the economic and environmental impact of its decision on the affected communities. Furthermore, it would mean that the Virginia and North Carolina delegations and their staffs - not to mention local elected officials in all potentially affected locations - were acting improperly by representing their constituents' economic and environmental interests, and that the Navy was acting improperly in listening to these concerns. Such an argument is not only contrary to our democratic system of government (in which our elected representatives are supposed to give voice to the legitimate concerns of their constituents), but it is also contrary to the specific requirements under NEPA. NEPA requires a full disclosure process and for an agency to consider input from anyone who gives it to them. 40 C.F.R. § 1503.1. This includes elected and appointed officials (and their staffs) as well as federal and state officials, citizens and citizens' groups.

Moreover, Plaintiff's political motivation argument defies logic. If the decision to split the OLF site from the basing site was made only on the basis of "political influence," as Plaintiffs argue, then why would the Navy not also have been influenced by the "political pressure" it supposedly received from the Virginian Congressional Delegation when the DEIS did not list home basing all the Super Hornets at NAS Oceana as the preferred alternative? Pltfs' Mtn. at 16, fn. 17. After all, the Virginia Delegation was headed by Senator Warner, the Chairman of the Senate Armed Services Committee. If the Armed Services Chairman had been pressuring the Navy to base all of the Super Hornets based at NAS Oceana, and the Navy was simply bowing to political pressure, it would seem logical that the Navy would have simply fallen into line in support of the Chairman's wishes. In the face of this obvious contradiction, there is a clear and far more rational (if less sensational) explanation for the Navy's decision to split site: After considering all the relevant factors, operational, environmental and socio-economic, as well as listening to the concerns of all interested parties, including the general public both through their

direct communication with the Navy and through their elected representatives, the Navy concluded that the best course of action to satisfy the stated purpose and need for the proposed action and to provide some noise mitigation in densely populated areas was to place eight fleet squadrons at NAS Oceana and two at MCAS Cherry Point. 68 Fed. Reg. 53,358. The AR clearly documents that the concept of split siting was considered before the need for an OLF was identified, that the concept of split siting was considered before comments were received from elected officials, and that the final decision to split-site the aircraft was based upon many factors, including noise mitigation and population encroachment. DEIS p. ES-7 and p. 1-6 to 1-8; FEIS Section 2.2.2.1 - 2.2.2.2 at p. 2-32 to 2-33;[11] 68 Fed. Reg. 53,358.

Plaintiffs also make much of the fact that Deputy Assistant Secretary Arny and Assistant Secretary Johnson (both political appointees) actively participated in the preparation of the FEIS. Pltfs' Mtn. at 36. NEPA requires that environmental impacts be considered in the decision-making process. No one other than the decision maker is in a better position to ensure that proper consideration is given to environmental factors. Secretary Johnson was the decision-maker who ultimately signed the ROD for the FEIS. 68 Fed. Reg. 53,359. It is entirely appropriate and proper for the decision-maker to require clarity and to request that additional information be included in the EIS because he was responsible for ensuring that the analysis in the EIS was complete and that the requisite "hard look" was taken at all the potential environmental impacts of the proposed action. To suggest that it is contrary to NEPA to change

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[11] AR 146584 is a joint letter signed by Senator Dole and Senator Warner, sent to the Secretary of the Navy (Mr. Johnson was the acting Secretary at the time) prior to the FEIS and the ROD, pledging their support in the Navy's decision where to homebase the Super Hornets. The letter reads in part, "The decision you make, above all, must be based solely on what is in the best interests of the national security and our men and women in uniform, for the present as well as the future...we commit to support your decision before the Congress." This is hardly an example of the so-called political pressure that the Plaintiffs' claim in their Motion, p 14-16.

a document as a result of senior leadership feedback reflects a basic misunderstanding of NEPA. *See* Methow Valley Citizens Council, 490 U.S. at 351 (NEPA merely prohibits uninformed agency action.); Prairie Wood Prods. v. Glickman, 971 F. Supp. 457, 471 (D. Or. 1997) ("This provision [40 C.F.R. § 1500.1(b)] does not prohibit agency officials from offering their opinions as to the strategy which they believe the appropriate analysis will bear out as the best alternative. Rather, it indicates that the general purpose of NEPA is to ensure that information is available before a decision is made or an action taken.").[12]

The input received from both the Congressional Delegations and the political appointees within the Navy is completely distinguishable from the facts of International Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249 (D. Wyo. 2004), cited by Plaintiffs on pp. 36 - 37 of their Motion. In that case, the District Court concluded that because of the public statements made by the Assistant Secretary of the Interior, "it does not seem that the NPS [National Park Service] could have issued any other rule than the one that was ultimately contained in the 2001 Snowcoach Rule." Id. at 1261. The AR in the case at bar demonstrates the opposite. There was a healthy dialogue and differences of opinion within the Navy as to what constituted the best decision for an OLF. The Tiger Team spent numerous hours, days, weeks and months debating these issues as the deliberative process played out. And in the end, the Team made a recommendation for the best course of action. That recommendation was the result of study, discussion, and compromise – the opposite of a predetermined and politically motivated process. The Plaintiffs' selected quotations from isolated e-mails that were taken out of context do not change the facts proven by the entire AR – that the Navy gave all of the potential environmental

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[12] In Prairie Wood, the Regional Forester's statement that he believed it would be appropriate to commence an Environmental Assessment addressing the screens (methods of evaluating proposed timber sales) was not found to be a basis for voiding the screen policy once implemented in compliance with applicable environmental procedures. Id.

impacts a "hard look." It is the entire AR, not distortions of that record by a few selective portions cited by the Plaintiffs, that will demonstrate to the Court that the Navy complied with NEPA in a manner unspoiled by predetermination or improper political motivatation.

c. Plaintiffs Likewise Have Failed to Establish That The Process Was "Reverse Engineered"

Plaintiffs' allegation that the NEPA process was "reverse engineered" to justify a preordained decision (Pltfs' Mtn. at 5) is likewise specious. That allegation is based almost exclusively on a single quote from a single e-mail, sent by Commander Robusto that has been taken out of context from a long e-mail string. AR 108989 to AR 108994. Pltfs' Mtn. at 5. Seizing his one-time use of the unexplained phrase, "reverse engineer," the Plaintiffs make a far-fetched attempt to link Commander Robusto's statement to selection of the Washington County site, thereby tainting the entire EIS process as a "reverse engineered" and thus post hoc, justification for a decision allegedly made in advance. Plaintiffs' theory regarding this e-mail is refuted by the fact that this email was transmitted in September 2002, at the end of the public comment period on the DEIS. The DEIS, published in July 2002, had already identified Washington County as one of two preferred OLF sites. DEIS p. ES-3. Had Plaintiffs discussed the entire e-mail string rather than quoting a small portion out of context, it would have been abundantly clear that Commander Robusto's comments were directed at the prospect of changing the OLF siting criteria in order to consider potential OLF sites in Virginia that were located well outside of the 50 nautical mile ("nm") arcs drawn around NAS Oceana, MCAS Cherry Point, and MCAS Beaufort. AR 108989 to AR 108994. These potential OLF sites had been considered but eliminated from detailed analysis because they were too far away from the potential basing sites. Comments received on the DEIS essentially suggested that sites previously eliminated be reconsidered, AR 108963 to 108967 and AR 108989. Inquiries from Congress concerning these sites were received as well. AR 108042.

To reconsider these sites would have required the Navy to walk the process of identifying OLF sites backward to look at sites to the North or West of NAS Oceana that were approximately 100 nm away. Hence Commander Robusto's use of the phrase "reverse engineer," reflected apparent frustration about the possible need to consider additional OLF sites *i.e.*, sites beyond those identified in the DEIS. Plaintiffs also fail to recognize that the opposition voiced in Commander Robusto's e-mail was ultimately successful; there was no subsequent change to the OLF siting criteria -- nothing was "reverse engineered." FEIS p. 2-69 and 2.4.3.[13] Significantly and strikingly, the e-mail string at issue represents exactly the type of discussion and debate that the NEPA process is intended to generate within an agency to ensure a thorough evaluation of all aspects of the proposed action. Yet again, by attacking the decision-making process in this manner, Plaintiffs merely prove that the Navy's process was thorough and comprehensive, not arbitrary or capricious.

Plaintiffs cite another e-mail from Commander Robusto in which he expresses apparent frustration that he was being pressured to "fabricate" operational reasons for split siting. Pltfs' Mtn. at 5. Plaintiffs seek to use this email to support their assertion that the Navy's reasons for locating eight Super Hornet squadrons at NAS Oceana and two at MCAS Cherry Point were "fabricated." AR 106947. Again, the facts are not so supportive of Plaintiffs. Commander Robusto recommended that the Navy simply stick to the factors which supported dual siting and recognize that "Even though it may not be in the Navy's best interest operationally...the Navy is willing to split site to lessen the adverse impacts of single siting (noise and air quality)." AR 106947.

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[13] FEIS section 2.4.3, 2-69, is titled specific to Fort Pickett, however, it also contains the following language, "The Navy considered OLF locations in excess of 50 miles from homebase only when economies of scale could be achieved by an OLF that would support two homebase locations."

Just as Commander Robusto's position prevailed in not "reverse engineering" the siting criteria, his position on split siting for environmental reasons also prevailed in this instance. The FEIS and the ROD adopted his position and stated explicitly that split siting has benefits for noise and air quality, but not operational benefits. FEIS 2-32 and 2-33, 68 Fed. Reg. 53,358. Completely contrary to Plaintiffs' accusations, nothing was fabricated about operational readiness. The factors considered for split siting already had been developed and discussed throughout the EIS process, well prior to Commander Robusto's e-mail. Commander Robusto's recommendation to avoid operational justifications that he felt were weak was adopted. Id. Despite Plaintiffs' implications, absurd on their face when one considers Commander Robusto's role as a technical advisor[14] and non-decision maker, nothing in the process was "fabricated" or "reverse engineered." If anything, the e-mails demonstrate the depth and effectiveness of the EIS analysis process.

Undeterred by lack of record support, Plaintiffs seek to find legal support for their "reverse engineering" and "pre-ordained" theories in a factually distinguishable case from a different circuit. Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000). In Metcalf, the Ninth Circuit case held that National Oceanic and Atmospheric Administration violated NEPA by making an irreversible and irretrievable commitment of resources before it even initiated its NEPA analysis (as the agency did not prepare an environmental assessment until more than one year after entering a contract that bound the agency to make a formal proposal for a whaling quota). The court noted that the case was "limited to [its] unusual facts and circumstances. . . ." id. at 1145, and it certainly was not about an agency's malicious "reverse engineering" of the NEPA process,

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[14] In fact, Commander Robusto was not the senior technical advisor on operational matters, either. Among those more senior on such matters was Commander, Naval Air Force, U.S. Atlantic Fleet (COMNAVAIRLANT), who was also personally engaged in the NEPA process.

as the Plaintiffs' incorrectly suggest to the Court. Pltfs' Mtn. at 25 -26. The court in Metcalf also made clear that NEPA "does not require that agency officials be 'subjectively impartial'" and that NEPA presumes that a federal agency is predisposed to favor a proposed action. Id. at 1142 (internal citations omitted).

Metcalf is hardly analogous to the facts in the Navy's selection of an OLF in Washington County, wherein the Navy did not bind itself to a particular course of action before it completed its NEPA analysis. In the case at bar, the Navy entered into a three-year assessment of the environmental impacts associated with a reasonable range of alternatives before the Assistant Secretary of the Navy chose the Navy's best course of action in the ROD.

Straining to find evidence of predetermination where none exists, the Plaintiffs imply that the Navy did not properly apply its OLF criteria but rather focused solely on North Carolina. Pltfs' Mtn. at 4. In fact, sites in North Carolina, South Carolina, Georgia and Virginia were considered and, in some cases, eliminated without regard for political boundaries (state/county lines). OLF Siting Study; *See* DEIS Section 2.4.1 at 2-60; *See also* FEIS Section 2.4.1.3 at 2-65 to 2-67. The Navy's modification of the 50 nm limitation was a function of operational efficiency, not state geography. Although the Navy initially would have required a remotely sited OLF to be located "within 50 nm of home field," AR 176357, the Navy's later flexibility regarding the 50 nm limitation on sites was motivated by factors unrelated to state action. Thus, in March 2001, Vice Admiral Mobley, then- Commander, Naval Air Forces, U.S. Atlantic Fleet, the same individual who had authored the 50 nm requirement, revised the 50 nm criterion to a "discriminator" as opposed to a "requirement" because he recognized that, despite increased overhead cost associated with flying Super Hornets longer distances (*i.e.*, fuel, time, maintenance man-hours, and airframe life expenditure) to sites beyond 50 nm, the more distant sites should be considered if there were "other attributes that compensate for the degradation caused by distance

beyond 50 nm." AR 025111. Id.[15]

According to the OLF Siting Study, one such compensating "attribute" exists when aircraft from more than one air station could use the same OLF. OLF Siting Study, p.1-3. In the case of an OLF located between the two 50 nm radius circles surrounding NAS Oceana and MCAS Cherry Point, the fact that a single OLF could serve two bases was seen as an efficiency offsetting increased overhead costs entailed by the slightly greater flight time from either of the bases. Id. Thus, the record establishes that the 50 nm limit was modified to allow for compensating efficiencies, not to avoid OLF sites in Virginia. This modification allowed the OLF study team to identify potential OLF sites in the small area beyond the 50 nm radius circles surrounding NAS Oceana and MCAS Cherry Point (the "Middle Study Area"). *See* OLF Siting

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[15] Vice Admiral Mobley's e-mail is so illustrative of the reasons for revision of the 50 nm criterion that it is worth quoting in full. There, he stated,

> My view on this: our operational 'requirements' have not changed. I do not like the term 'requirements' as it is applied to a process such as this EIS, where so many variables must be weighed, one against the other. I believe we should start using the term 'discriminator' instead of 'requirement.' Our operational 'discriminator' is at 50 nm - everything 50 nm or less is good and scores equally, everything beyond 50 nm is a degrader, the further beyond 50 nm, the larger the degradation. So this becomes a scaling issue instead of a yes/no, zero or one way of assessing our options. Think about it - is an OLF that is 52 nm away score zero while one that is 50 nm score one? How about an OLF that is 1nm away? It's inside of 50 nm but it sure doesn't fill the bill! 50 nm is the discrimination point. OLFs beyond that are not as good as OLFs within 50 nm, but they may have other attributes that compensate for the degradation caused by distance beyond 50 nm. Some of our operational discriminators do not have as much flexibility. For example, runway length. This discriminator is dictated by the laws of physics, and there is no wiggle room on the short end. So not all discriminators are can [sic] be viewed the same either. 50 nm is still a valid number - it's the discrimination point, not the qual/non-qual point. Hope this helps, JSM

AR 025111.

Study, Figures 3-1, 3-2, 3-3 and 3-4. However, as no compensating "attributes" could be identified for areas other than the Middle Study Area, there was no justification for the Navy to open the OLF study area beyond 50 nm in every conceivable direction from the air stations, or to develop OLF sites beyond 50 nm from any home base that could not be used by two bases. OLF Siting Study, p.1-3. Thus, areas to the North or to the West of NAS Oceana and to the South or to the West of MCAS Cherry Point were reasonably excluded from the study. Id.[16]

These operational considerations, not politics, caused the Navy not to consider additional sites in Virginia. Thus, although potential OLF sites in Virginia mentioned in numerous public comments (*e.g.*, Fort Pickett, Fort A.P. Hill and Wallops Island) could be reached by Super Hornets based at NAS Oceana, they could not be used effectively by aircraft based at MCAS Cherry Point or MCAS Beaufort. Therefore, siting an OLF at any of these locations would not provide efficiencies to offset the increased costs of flying substantially more than 50 nm and was not considered. *See* OLF Siting Study Figure 3-4, FEIS p. ES-16) and FEIS 2-69 (providing additional information, including an explanation of why Fort Pickett was not a viable site using that rationale). The Navy is not "obligated to consider in detail each and every conceivable variation of the alternatives stated; it need only set forth those alternatives sufficiently to permit reasoned choice." Coalition for Responsible Regional Dev. v. Coleman, 555 F.2d 398, 400 (4th Cir. 1977) (internal quotations omitted). As it was not reasonable for the Navy to consider OLF sites beyond the 50 nm range of a home base location that could not be used effectively by aircraft from other bases, NEPA did not require more elaborate consideration of those other Virginia siting locations.

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[16] For these reasons, sites in North Carolina, South Carolina, Georgia and Virginia were considered, but were eliminated without regard for political boundaries (state/county lines). OLF Siting Study; *See* DEIS 2.4.1 at p. 2-60; *See also* FEIS 2.4.1.3 at p. 2-65 to 2-67.

In summary, Plaintiffs have not shown that the Navy's OLF siting decision was the product of a pre-determined outcome. Plaintiffs' reliance on a few selected e-mails and other general correspondence from an AR encompassing over 190,000 pages to support a position that the Navy's decisions were "reverse engineered," and to support a "predetermined" and "politically motivated" decision is misplaced, and cannot be sustained based on a review of the entire record. Contrary to the Plaintiffs' contentions, the AR demonstrates that there were healthy and extensive discussions concerning all the various alternatives and issues involved with the home basing and the construction of an OLF for the Super Hornets. The record clearly shows that the Navy received new information throughout the three-year NEPA process, and the information was thoroughly evaluated and considered. Further, the e-mails cited by the Plaintiffs make obvious that the process was an iterative one, as it is supposed to be under NEPA. Information and assumptions developed during the NEPA process are always "OBE," or "overcome by events" when new or more detailed data became available. If NEPA required a slavish adherence to starting the process over from scratch every time some issues became "OBE," no project could ever be completed. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 554-555 (1978). Instead, NEPA requires that reasonable steps be taken to take these new facts into account in the overall process. NEPA does not mandate particular results, but simply prescribes a decision-making process. Methow Valley, 490 U.S. at 350. The Navy more than met this standard, and this Court should find that the Navy met its obligation to appropriately consider a full range of reasonable alternatives and grant the United States summary judgment on this claim.

2. Plaintiffs Have Not Shown That The Navy's Analysis of The Environmental Impacts of OLF Development at Site C is Inadequate Under NEPA

Plaintiffs also argue that the Navy violated NEPA by failing to take a "hard look" at the environmental impact of developing an OLF at Site C. The United States has demonstrated

otherwise. United States' Mtn. for S.J. Plaintiffs cite to Hodges v. Abraham, 300 F.3d 432 (4th Cir. 2002), suggesting that if this Court makes a "searching and careful inquiry" into the facts it should find that the Navy violated NEPA. Pltfs' Mtn. at 40. Plaintiffs correctly stated the equation, but still arrived at the wrong answer. A searching and careful inquiry into the facts that underlie the decision reached by the Navy to construct a new OLF at Site C will lead this Court to find that the Navy has more than taken the required "hard look." Not only are the Plaintiffs wrong about the factual record, they also fail to recognize the deference owed the Navy's OLF siting decision under Hodges. *See* 300 F.3d at 438 ("if the agency has taken the required 'hard look,' [a court] must defer to it unless its decision were arbitrary or capricious").

Contrary to Plaintiffs' assertions, the Navy made a careful and detailed analysis of the environmental impacts of the planned development of an OLF at Site C by considering the opinions of its own experts, through consultation with outside experts, and by giving careful consideration to the numerous comments received in the NEPA process. This fully satisfies NEPA's "hard look" requirement. *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378-85 (1989); Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir. 1999). Specifically, the Navy recognized that the development of an OLF at Site C would impact the Pocosin Lakes NWR and the migratory birds that winter there, and recognized that there was a BASH risk associated with this site. For these reasons, the Navy included an extended discussion in the FEIS of these issues. FEIS p. 12-120 to 12-123 and 12-128 to 12-145 It does not matter whether Plaintiffs agree with the Navy's decision to proceed in the face of these impacts and risks, as long as the environmental effects of a proposed action are sufficiently identified and evaluated, the Navy is vested with the discretion to determine that other values outweigh the environmental costs. *See* Marsh, 490 U.S. at 378; Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996).

a. Plaintiffs Have Not Established That The Navy Inadequately Considered the Impacts of its OLF Siting Decision on Migratory Birds and the Pocosin Lakes NWR

Plaintiffs allege that the Navy inappropriately minimized the environmental impact of the OLF on migratory birds and the Pocosin Lakes NWR. Pltfs' Mtn. at 40 - 50. Contrary to Plaintiffs' assertions, those impacts and risks were not "minimized."

When the Court considers the record on this issue, there is abundant evidence that the Navy thoroughly examined the impacts of its OLF siting decision on migratory birds and the Pocosin Lakes NWR. Moreover, even a cursory review of Plaintiffs' arguments (*see* Pltfs' Mtn. at 40 - 50), establishes that Plaintiffs themselves recognize that the Navy considered all such impacts, but simply disagree with the Navy's analysis and concerns. And because much of this disagreement is based on extra-record evidence, the Court should not even consider it. For example, the Plaintiffs argue that the Navy should have done more analysis by citing to extra-record comments from the F&WS, which were not sent to the Navy until July 2004, nine months after the ROD. Pltfs' Mtn at 43, fn. 37. As this material was not presented to the Navy by the time it reached its OLF decision, it is not appropriately subject to judicial review pursuant to the APA.

The Navy actively sought the input from F&WS and other agencies from the earliest point in the NEPA process, even before the OLF site alternatives had been identified for analysis in the DEIS. For example, the Navy informed potentially interested federal and state agencies, including the F&WS, in December 2000 that the Navy was undergoing an OLF Siting Study, and that the Navy "would be contacting [this] agency during the site screening process for specific resource information, and for consultation on environmental issues of concern as specific sites and/or locations are identified." AR 019054 to AR 019056. The letter further stated that, "We also request that you provide us any specific comments and/or concerns that you feel should be considered in the OLF Siting Study." AR 019054 to AR 019056. The F&WS did not respond

officially to this notification letter.

On July 26, 2001, when the Navy had narrowed the list of candidate sites during the OLF Siting Study process to 10 in North Carolina, 2 in Virginia, 3 in South Carolina, and 1 in Georgia, the Navy again sought input from F&WS and other agencies and specifically asked them to comment on "the presence of listed or candidate threatened or endangered species; rare species; significant/critical wildlife habitat; unique natural communities; or other significant features within these candidate sites." AR 019656 to AR 019657. The Navy requested this information to augment information that was being used to conduct the site reconnaissance of each of the candidate sites. AR 019656 to AR 019657. The Navy informed the F&WS and other agencies that "[i]ndirect impacts associated with aircraft noise will extend beyond the airfield boundaries, and [that] the Navy is proposing to acquire and/or control development on lands within the 60 DNL noise contours for uses compatible with aircraft operations." The F&WS Raleigh Field Office, which has jurisdiction of the candidate sites in North Carolina, did not comment on the distance that the airfield should be from the NWRs in order to avoid impacts, or make any comment regarding the potential for noise impacts.

The Plaintiffs also mischaracterize the "field level information" collected by the Navy, suggesting that the Navy's "conclusions in the FEIS are based largely on a single visit to Site C in January 2003." Pltfs' Mtn. at 44. Contrary to what the Plaintiffs state with regard to the Navy's efforts to gather "field level information," the Navy met with members of the F&WS twice in 2002 to discuss concerns raised by the F&WS in its February 2002 scoping comment letter. The first meeting occurred in February 2002, during which Navy officials provided representatives from the F&WS Raleigh Field Office, the Pocosin Lakes NWR, Roanoke River NWR, Alligator River NWR and Mattamuskeet NWR with a tour of NALF Fentress to observe aircraft conducting FCLP operations, and then discussed with F&WS and Refuge officials the concerns

they expressed during the scoping period, including concerns about operation of an OLF near several of the NWRs. At this time, the F&WS expressed several concerns about operation of an OLF near several of the NWRs. With regard to noise impact, however, this was "not as much of an issue as the wetlands and the BASH" except regarding heron rookeries [at the Roanoke River NWR] (which are not near Site C) AR 064315 to AR 064316. In a meeting held in April 2002 with representatives of the F&WS Raleigh Field Office, the Great Dismal Swamp NWR, Pocosin Lakes NWR, Roanoke River NWR, Alligator River NWR and Mattamuskeet NWR, the F&WS expressed concerns about the alternative OLF sites, but at this point, noise impact on waterfowl was not identified as one of those concerns. AR 118139 to AR 118141.

In addition, Navy representatives including biologists, environmental planners and the EIS project manager made three formal site visits to the Site C area over the winter of 2002-2003.[17] AR 117359 to AR 117360, AR 122192 to AR 122193 and AR 125648 to 125649. Two of the three site visits included representatives from the F&WS (December 2, 2002 and January 14/15, 2003). The January 14/15, 2003 site visit also involved state resource agency officials and members of non-governmental organizations as well as F&WS. Plaintiffs express concern that "ground rules" were established for the January, 2003 meeting arranged by Joe Albea. Pltfs' Mtn. at 45. These "ground rules" were perfectly appropriate since the public comment period on the DEIS had already passed, so allowing the attendees at this meeting to provide additional comment, rather than simply providing information to be considered, would

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[17] In addition, Plaintiffs have taken a statement made by Mr. Netti in his declaration out of context, suggesting that his statement that he "can't say we looked at anything in great detail . . ." had to do with the site visits. In fact, this statement referred to the OLF Siting Study. Netti Deposition p. 32 to 37 Further, Plaintiffs' suggestion that because Greg Netti, a biologist working for Ecology & Environment ("E&E") and one of the members of the Navy/E&E team working on the EIS, only visited the site once during ~~in~~ the winter months, the Navy did not take a "hard look," is misleading, as other members of the team preparing the EIS made additional visits. AR 117359 to AR 117360, AR 122192 to AR 122193 and AR 125648 to 125649.

have placed them at an unfair advantage when compared with any other interested party.

Moreover, Plaintiffs appear to suggest that because the FEIS states that "little information is available that evaluates the effect of aircraft overflights on tundra swans" (FEIS, p. 12-121), the Navy conclusions are incorrect. To the extent that it relies upon a Navy acknowledgment of some scientific uncertainties with respect to noise impacts on the specific species of waterfowl near the OLF, Plaintiffs' argument must fail. Here, the Navy: 1) acknowledged that "[l]ittle is known about the impact of low-level jet aircraft flights and associated noise on the migratory patterns or migration-related mortality of waterfowl," FEIS p. 12-121; 2) reviewed the available data and studies; 3) evaluated potential impacts; and, 4) reasonably concluded the potential impacts of operations at Site C were expected to be minimal. That Plaintiffs might prefer additional scientific data does not render the Navy's analysis arbitrary or capricious, and the Navy faithfully discharged its NEPA "hard look" responsibilities. *See* Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983); Coalition on Sensible Transp. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987) ("The NEPA process involves an almost endless series of judgment calls. . ." and while it "is of course always possible to explore a subject more deeply and to discuss it more thoroughly," the "line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.").

Plaintiffs also assert that "Aircraft overflights, particularly those by an F/A-18 Super Hornet, have dramatically negative effects on snow geese. . . ." Pltfs' Mtn. at 42, but fail to cite any support whatsoever for this allegation. It appears that Plaintiffs make this assumption based upon their reading of the Gunn & Livingston study (Ex. 17 in Plaintiffs' PI Appendix) which finds that "snow geese were flushed by a Cessna 185 at altitudes up to 10,000 feet and when flying at lower altitudes, the birds were flushed up to nine miles away, (Exh. 17, pp. 263-64)." Pltfs' Mtn. at 42, fn. 35. In the United States' Mtn. for S.J., the United States discussed the Gunn

& Livingston study, and acknowledged that during the NEPA process the Navy had not considered certain findings in that study. The United States also pointed out why this omission did not affect the validity of the Navy's NEPA analysis. *See* United States Mtn. for S.J. at 36 - 37. In addition to the points made in the United States' opening brief regarding the significance of this study, it is also critical to point out that the authors of the study stated that "[t]he significance of this [flushing] in the short-term is not clear, as no attempts were made in this study to determine accommodation to disturbance or the cumulative effects of overflights." (Exh. 17, p. 267). In fact, the Plaintiffs cite *NO* study that find that disturbance from aircraft overflights necessarily causes negative impacts to the affected birds, whether "dramatically negative" or not.

Plaintiffs take issue with the Navy's analysis of existing military operations on other wildlife habitats, such as the Dare County Bombing Range and Piney Island Bombing Range. Plaintiffs rely on the affidavits of Dennis C. Luszcz and Ronald L. Merritt, the F&WS "Technical Comments," and deposition transcripts, all of which are outside the AR and should not be considered by the Court. In any event, none of Plaintiffs' concerns has merit. While it is true that flights below 1,000 feet will occur at the OLF, which is quite different from some of the flight patterns at the other military operation sites mentioned by Plaintiffs,[18] these flights will occur over three and a half miles from the NWR at the closest point (at the edge of the disconnected Canal B Tract) in any of the field carrier landing practice patterns. In addition, the Navy has already decided to move the projected holding pattern that came near the refuge that was used for noise modeling, which will further reduce any impacts. Declaration of Rear

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[18] In fact, flights at the Dare County Bombing Range occur at all altitudes, including many low level flights, and those aircraft using that range now fly directly over the Alligator NWR. FEIS p. 9-42, and Figure 9-7 on p. 9-43. Alligator River NWR supports more than 200 species of resident and migratory birds. FEIS p. 9-48.

Admiral Stephen A. Turcotte, para. 12, Exhibit 10 to the United States' Opp. to P.I. ("Turcotte Declaration").

Plaintiffs also take issue with the comparison of the current flights in R-5314 and the projected OLF activity at Site C and assert that the Navy should have conducted additional study of the "frequency, speed or altitude of these flights." Pltfs' Mtn. at 47 - 48. With all due respect, this is classic fly-specking. A plaintiff, particularly one (as here) inexorably opposed to a proposed action, can always come up with additional studies that, in their view, are necessary to make an informed decision. But the Navy's analysis of these existing flights was adequate and reasonable as part of its overall exhaustive analyses. The Navy's discussion of the potential impacts did not simply consist of "conclusory remarks" but included an analysis based on its review of available literature, information gathered in the field visits, its meetings with numerous experts and through its commissioned studies. This is contrary to what the court found of the Marine Corps' EIS in Defenders of Wildlife v. Babbitt, 130 F. Supp. 2d 121 (D.D.C. 2001), relied upon by Plaintiffs on page 49 of their brief. As such, their reliance on this case is misplaced.

Finally, citing the Navy's Answer to Environmental Plaintiffs' Complaint, Plaintiffs assert that the Navy has admitted "it did not know" about the adverse effects of aircraft on migratory waterfowl. Pltfs' Mtn. at 42. These answers responded to the generalized, vague allegations in the Complaint, and are not relevant to whether the Navy adequately analyzed the potential impacts of the OLF during the NEPA process. And contrary to the Plaintiffs' assertion, the evidence shows that the Navy took a "hard look" at the potential impacts on the NWR and migratory birds, having reviewed available literature, conducted field visits, commissioned studies and consulted with numerous experts. The Navy fully complied with NEPA.

b. Plaintiffs Have Not Shown That The Navy Failed To Took a Hard Look at the Potential Impact of Bird-Aircraft Strike Hazard ("BASH")

The Navy also carefully considered and took a hard look at the potential BASH risk throughout the NEPA process. The Navy's analysis was more than adequate to support the conclusion that the BASH risk at Site C is manageable.

In an effort to undercut the Navy's analysis, Plaintiffs repeatedly misstate and misrepresent the AR concerning: 1) when the Navy first started its BASH analysis of this issue; 2) what the Navy did to prepare its analysis of BASH and what Plaintiffs characterize as the Navy's "foundation" for its BASH position; and, 3) the applicability of the "operational siting criteria" for selecting an OLF. Pltfs' Mtn. at 50 - 56. The United States has previously rebutted Plaintiffs' earlier arguments on this issue, such as when the BASH Plan is required to be completed, in its Mtn. for S.J. at 39 - 46.

First, it is simply not the case, as Plaintiffs claim (based solely on extra-record evidence that the Court should not consider), that "[t]he Navy did not truly become focused on BASH issues until the January 2003 meeting with Joe Albea." Pltfs' Mtn. at 51. In fact, the Navy considered BASH issues throughout the OLF Siting Study process and throughout preparation of the DEIS and FEIS. The Navy discussed the BASH issue, among others, with the F&WS in February 2002 and April 2002. AR 064315 to AR 064316; AR 118139 to AR 118141. The Navy also prepared a summary of the comments received during the scoping period on the DEIS and identified bird-aircraft strikes as one of the key issues (*see* FEIS, p. A-20). The potential for bird-aircraft strike hazards was discussed in the DEIS for the OLF sites on pages 12-87 through 12-96, and was one of the considerations the Navy used for determining the preferred OLF sites.

It is fair to say that the Navy focused much more on the potential BASH risk at Site C in late 2002 and early 2003, when specific concerns were raised by commenters about the adequacy of the BASH discussion in the DEIS. But this was perfectly appropriate and wholly consistent

with NEPA. Draft EISs are released to the public and others, including federal and state resource agencies, for comment and review. The FEIS then addresses substantive comments on the DEIS by "supplementing, improving or modifying" the analyses. (CEQ Regulations Part 1503.4). In this case, the Navy supplemented, improved and modified its analysis of the BASH risk in the FEIS. The FEIS states in the Section 1.3 (Changes from the DEIS to the FEIS), that

> the Navy conducted supplemental analyses, including that the Navy modified the application of the U.S. Air Force Bird Avoidance Model (BAM) that was used to evaluate the average bird-aircraft strike risk at the proposed OLF sites, expanded the discussion of BASH and management plans to reduce the BASH potential in the vicinity of each of the proposed OLF sites, and incorporated a site-specific BASH analysis of the preferred alternative Site C based on a radar survey.

(FEIS p. 1-34).

Plaintiffs also continue to mischaracterize the purpose of the radar study conducted at Site C by Geo-Marine, Inc. The Navy clearly stated that the purpose of the radar study (which, as we have already noted, GMI performed in addition to a BASH assessment of all six OLF sites) was limited to serving as simply "one data point relied on in the overall BASH assessment of all OLF sites. . .". 68 Fed. Reg. 53,357. The fact that the radar study was conducted only at Site C does not demonstrate that "the selection of Site C was a foregone conclusion," as Plaintiffs claim. Pltfs' Mtn. at 52. Rather, it simply recognized that Site C was, by that point in the NEPA process, legitimately different from most of the other potential OLF sites, because it had been identified as a preferred alternative (along with Site E, Craven County), and it was the only one of these two preferred alternatives that had presented a potential BASH concern. Similarly, the Navy's comparison of the BASH risk at Site C with that present at other Navy installations was an important component of the Navy's BASH analysis, but was not by any means the end of that analysis.

As such, Plaintiffs' reliance on the Ninth Circuit's decision, Seattle Audubon Society v.

Espy, 998 F.2d 699 (9th Cir. 1993), *see* Pltfs' Mtn. at 52, is misplaced. Seattle Audubon held that the Forest Service improperly concluded that it did not have to "undertake further scientific study" and, as Plaintiffs admit, went on to rule that the Forest Service had relied upon "stale scientific evidence, incomplete discussion of environmental effects . . . and false assumptions regarding the cooperation of other agencies and application of relevant law." Id. at 704. The Navy sufficiently identified and evaluated BASH as a serious issue early in the NEPA process, took a hard look at the relevant BASH factors, and rationally explained how its evaluation of BASH supported its decision. This is all that NEPA requires. *See* Baltimore Gas & Electric, 462 U.S. at 105, Marsh, 490 U.S. at 377, 385. Again, as with so many other issues, the Plaintiffs simply disagree with the Navy's conclusions on BASH risks.

The Plaintiffs also argue that the a series of e-mails involving Tiger Team members demonstrated that the need to manage the BASH risk at Site C was somehow inconsistent with the operational criteria that FCLP's must be performed at a home base or a remotely-sited OLF that is "capable of 24-hour operations." FEIS at p. 2-7. But the 24-hour capability cited in the FEIS does not, as Plaintiffs imply, mean that if a potential airfield might (hypothetically) ever have to close temporarily for any reason, it somehow fails to meet the criteria. A fair reading of the FEIS shows that the capability in question is simply the ability to train during darkness, because, as the FEIS notes, "[t]he majority of FCLP operations are conducted at night, thus limiting available training time to periods of darkness, which vary seasonally." The string of e-mails the Plaintiffs' cite to discount the Navy's operational criteria actually demonstrates the type of extensive discussion and debate that occurred between Tiger Team members when responding to the comments received after the DEIS was published regarding BASH. Once again, the Plaintiffs' recitation of facts make clear that the Navy considered all factors presented in evaluating the environmental consequences for each potential OLF site.

Moreover, as one of the e-mails the Plaintiffs cite makes clear, however valuable their

input might be, the Tiger Team members were not the decision makers on the issue of whether the BASH risk was manageable at Site C. As Commander Robusto noted in that e-mail, "Operator's perspective: This is a big problem. Can it be mitigated? If yes, proceed. If no, is it a showstopper? *That will be a question for RADM Z to answer.*" AR 117488 (emphasis added). "RADM Z" was Rear Admiral Zortman, then Commander, Naval Air Force, U.S. Atlantic Fleet, who was among the operators engaged in the NEPA process who was senior to Commander Robusto.

The Plaintiffs, citing another e-mail from Commander Robusto that states, in part, "Building an OLF in severe anything would not be prudent," imply that the Navy had therefore failed to take a "hard look" at the BASH potential. As the United States has already demonstrated in its Mtn. for S.J., the Navy did take a very hard look at the BASH risk. Moreover, it is important to note that the term "severe" in the BASH context is a term of art, with a very specific meaning familiar to those who manage the BASH risk on a daily basis, such as Matt Klope, the Navy's BASH program manager. And, as noted in the United States Mtn. for S.J., those who deal with this problem on a daily basis concluded that the BASH risk was manageable. GMI Study p. 1-2, 2-4 and 2-5; AR 134719 to AR 134721 and AR 161012 to AR 161013.

As Plaintiffs acknowledge, Pltfs' Mtn. at 55, Rear Admiral Stephen Turcotte has stated, that once the BASH Plan is developed, "management of the BASH risk at the OLF may involve adjusting flight operations, for example at certain times of day in response to increased bird activity. . ." Turcotte Declaration, para. 14. The potential for adjustment of flight operations does not, however, translate into "malleability of the Navy's application of its own OLF operational siting criteria." Pltfs' Mtn. at 53. Rather, it demonstrates that the Navy is serious when it says it intends to take appropriate actions to manage the BASH risk if and when this Court's injunction is lifted.

3. Plaintiffs Have Not Shown that The Navy Failed to Take a "Hard Look" at the Cumulative Impacts Associated with Proposal to Development the OLF at Site C

Plaintiffs' cumulative impact argument embraces three points, all of which were fully addressed in the Navy's cumulative effects analysis in the EIS. Plaintiffs allege that the Navy failed to consider the cumulative impact of operations at the OLF with the proposed Mattamuskeet Military Operations Area ("Mattamuskeet MOA"), as well as with the use of existing Military Training Areas by the Super Hornets. Plaintiffs also now suggest that the Navy was also required to assess the impacts of both the development of the OLF and the proposed establishment of the Core and Mattamuskeet MOAs in the same EIS. Pltfs' Mtn. at 56 - 59.

First, the Plaintiffs' claim that the Navy failed to consider the cumulative impact of operations at the OLF and use of the proposed Mattamuskeet MOA is without merit. The Navy did consider this impact in the FEIS which concluded that, of all the potential OLF sites, only Site D in Hyde County would be in proximity to the proposed Mattamuskeet MOA (it is immediately adjacent to the proposed MOA's eastern boundary). For that reason, the Navy discussed the cumulative impacts associated with that proposed site. FEIS p. 13-14 and 13-15. None of the OLF alternative sites were in proximity to the Core MOA, which was also included in the United States Marine Corps' proposal to the Federal Aviation Administration ("FAA"). Not only have Plaintiffs failed to show that the Navy's analysis of cumulative impacts with respect to Site D was arbitrary or capricious, but given that Site C is even further away from the Mattamuskeet MOA than Site D, the Plaintiffs' argument equally fails.

The Navy's determination that the noise impacts of the proposed OLF at Site C and proposed Mattamuskeet MOA did not affect the same geographic area is also correct, as the projected noise contours from the OLF operations would not extend into the MOA, if the MOA

were established.[19] A very small part of the projected eastern holding pattern (not the runway area or FCLP pattern) lies underneath land that is also underneath the proposed MOA for Site C that was used in the noise modeling study, FEIS p. 12-5, FEIS Figure 13-2 at p. 13-11 and Figure 12-12 at p. 12-35. However, flights on this projected eastern holding pattern would occur at an altitude of 2,000 to 2,500 feet AGL (above ground level) (FEIS p. 12-120), whereas the floor of the MOA would be 3,000 feet AGL with 75% of the operations occurring above 10,000 feet AGL. Furthermore, the projected noise contours for OLF Site C do not extend to the proposed MOA. FEIS Figure 13-2 at p. 13-11; Figure 12-4 at p. 12-11; and Noise Study Figure 4.5.2-3 at p. 4-187. And, as the United States has previously noted, the Navy has indicated that the location of that holding pattern will be moved. *See* Turcotte Declaration, para. 12. There certainly were no "false assumptions" made or any "materially incorrect premise" relied upon by the Navy, as the Plaintiffs allege. Pltfs' Mtn. at 58.

Plaintiffs argue that "The fact that this area of overlap [i.e., the projected eastern holding pattern, which will be moved] occurs at the boundary of the Pungo Unit of Pocosin Lakes NWR in an area of high concentrations of waterfowl make the resulting cumulative impacts of heightened concern." Pltfs' Mtn. at 57 - 58. But it is worthy of note that operations in the proposed Mattamuskeet MOA are not projected to have significant impact.[20]

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[19] The United States has moved to dismiss the Environmental Plaintiffs' NEPA challenge to the Marine Corps' Environmental Assessment prepared for the proposal to the FAA to establish the MOA since it is only a proposal and not final agency action subject to judicial review. *See* United States' Motion to Dismiss (MOA Claim), filed March 24, 2004. To date, the Court has not ruled on that motion.

[20] For the Mattamuskeet MOA, 25% of the sorties will occur between 3,000 ft and 10,000 ft. AGL. The remaining 75% would occur above 10,000 ft. (total # of annual sorties: 2,423). Operations in the Mattamuskeet MOA will have an average sortie length of 45 minutes. For the Mattamuskeet MOA, the average number of flights is identified as 9.3 sorties per day. (Draft EA Section 4.1.1.1 p. 4.1-7). These flights will be distributed throughout the Mattamuskeet MOA airspace, with its width and length dimensions of approximately 25 by 30 miles (Draft EA

Plaintiffs also argue that the Navy failed to analyze the impact of proposed operations at Site C when added to existing and proposed military training areas in the region. Pltf's' Mtn. at 59. But the Navy addressed the cumulative impacts on commercial and civilian use of airspace as well as military training areas in the region, in Section 12.1 of the FEIS, including the effect of establishing Class D airspace at the OLF (FEIS p. 12 -23) on existing air traffic, and the effect of OLF operations on aerial surveys performed by USFWS and National Park Service (FEIS p. 12-23 to 12-24). Impacts to other aircraft operations in the vicinity of OLF Site C are discussed on pages 12-26 to 12-27. The Plaintiffs fail to explain how this analysis is insufficient.
The Navy evaluated the cumulative environmental impacts associated with use of military training areas in Eastern North Carolina by the Super Hornet squadrons in Section 10 of the FEIS. Only after considering these factors did the Navy conclude that there were no existing or proposed airspace use in the vicinity of OLF Site C that could have a cumulative impact. The natural resources that would be potentially impacted by aircraft operations within the military training areas are not within the same geographic area as the OLF Site C as determined by the boundaries of the defined airspace and/or noise contours. The Plaintiffs do not explain what further impact they believe should have been considered in this regard or why the area of impact should extend beyond the defined airspace or projected noise contours.

Potential cumulative impacts of airfield or airspace use for the homebasing and OLF alternatives were discussed in Section 13. The Navy discussed in that section the potential cumulative impacts caused by numerous factors, including the proposed MOAs. In fact, the

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Section 2.2.3 p. 2-11). These high altitude military aircraft flights will also be randomly distributed throughout the MOA, so that any specific point underlying the MOA will be subject to increased noise levels only during a very small timeframe in each typical training day. The cumulative Ldnmr (onset-rate adjusted day night average sound level; FEIS p. B-11) for the proposed Mattamuskeet MOA is less than 50 DNL, slightly above ambient noise levels. (Draft EA Section 4.2.2.1 p. 4.2-4 and 4.2-51) (Draft EA Section 2.2.2).

Navy conducted a detailed analysis of the potential changes in the number of flights within the MOAs, depending on which alternatives were chosen in the ROD. FEIS 13-13. Only after going through this analysis did the Navy conclude that "the cumulative effect on airspace operations is not considered significant." FEIS 13-14. After considering these factors, the Navy went on to consider the potential cumulative airspace impacts of the various OLF sites. FEIS 13-14 to 13-15. The Navy recognized that the most likely place for cumulative impacts to be significant was at Site D - the proposed Hyde County OLF site - since the proposed MOAs would overlay much of Hyde County. After considering the specific conditions at Site D, the Navy concluded that the only one of the OLF sites that would create actual cumulative impacts was the Hyde County site, and that those cumulative impacts would be "minimal." FEIS 13-15. Finally, the Navy considered the potential cumulative impacts of noise in comparison to baseline conditions. FEIS 13-15. After considering these noise impacts, the Navy concluded, again, that the only place this might be a potential problem was at Site D. Even at Site D, however, the Navy concluded that the cumulative noise impacts could be mitigated by controlling the land use of the property immediately adjacent to the OLF, where those cumulative impacts would be the greatest. FEIS 13-15.

In fact, the siting criteria for the OLF Siting Study included avoidance of controlled airspace and military training routes, so as to avoid cumulative impacts associated with operations at OLF Site C. As stated in the DEIS on page 2-62, "Following the identification of OLF candidate sites, operators and air traffic control personnel within the Navy and Marine Corps performed an airspace analysis to identify any airspace constraints that may potentially conflict with the alternative candidate sites. As a result of this analysis, some of the candidate sites were eliminated, and others required modification to avoid or minimize conflict with existing SUA." DEIS p. 2--62.

Plaintiffs' reliance on Grand Canyon Trust v. Federal Aviation Admin., 290 F.3d 339

(D.C. Cir. 2002) is misplaced. In Grand Canyon, the court found that the FAA had failed, in an EA, to consider the cumulative impacts of a proposed larger replacement airport with other significant air traffic near and over the park ("54 daily flights in 2008 and 69 in 2018 associated with St. George" Id. at 345, and "250 daily aircraft flights near or over the Park that originate at, or have as their destination, airports other than that in St. George . . . or the air tours." Id. at 346). In the Grand Canyon case, the FAA failed to consider the potential cumulative impacts of the flights nearby the proposed airport. In the case at bar, however, the Navy considered these potential cumulative impacts. "The FEIS analyzed whether the basing of the Super Hornets would change the existing use of those ranges (Piney Island, Brant Island Shoal, Dare County and Tyrell County, and on airspace designated as a Military Operating Area [MOA]). The conclusion reached in the FEIS was that use of these ranges would remain approximately the same or decrease. Similarly, the Navy does not anticipate any increase in the use of the MOAs because of Super Hornet home basing or a new OLF. Therefore it was not necessary to include those impacts in the cumulative effects analysis." 68 Fed Reg. 53,358.

Finally, Plaintiffs appear to suggest in footnote 46 on p. 57 of their Motion, that the Navy was required to assess the impacts of both the development of the OLF and the proposed MOAs in the same EIS. First, Plaintiffs' notice of issues on which they stated they intended to move for summary judgment, provided via correspondence dated November 5, 2004 and November 12, 2004, Ex. 2 to United States' Mtn. for S.J., did not identify the issue of whether the Navy was required to prepare a single EIS for both proposals. Second, and more importantly, Plaintiffs are wrong. Even assuming that the MOA proposals and the OLF proposal are "similar" actions as alleged by Plaintiffs, (which the United States does not concede) their claim that "similar" actions must be considered together in a single NEPA document is legally incorrect. It is true that CEQ regulations state agencies "should" discuss "connected" and "cumulative" actions in the same impact statement. 40 CFR § 1508.25(a)(1)&(2). These same regulations, however, give

more deference for "similar" actions: "[a]n agency *may wish* to analyze these [similar] actions in the same impact statement." 40 C.F.R. § 1508.25(a)(3) (emphasis added). Alternatively, an agency may conclude that two separate NEPA documents constitute "the best way to assess adequately the combined impacts of similar actions. Earth Island Inst. v. United States Forest Service, 351 F.3d 1291 (9th Cir. 2003); *quoting* 40 C.F.R. § 1508.25(a)(3); N.C. Alliance for Transp. Reform, Inc. v. USDOT, 151 F. Supp. 2d 66, fn. 19 (M.D.N.C. 2001)(even assuming actions are similar, failure of the agency to analyze their impacts in one document "provides no basis for finding a violation of NEPA."). The Navy's separate NEPA actions for the proposal to develop the OLF and the proposed MOAs, are consistent with both case law and CEQ regulations. The fact that, as appropriate, personnel working on the MOA NEPA matter corresponded with personnel working on the F/A--18 E/F NEPA matter on matters of mutual interest is perfectly understandable, not sinister, as Plaintiffs imply, and is completely irrelevant as to whether there was an obligation to analyze both proposals in the same NEPA document.

The Navy has complied with NEPA and taken the requisite "hard look" at the cumulative impacts of the development and operation of an OLF at Site C with other existing and proposed actions in the region, and is entitled to summary judgment on this claim.

4. The Mitigation Measures Provided by the Navy Fully Satisfy NEPA

Plaintiffs assert that the Navy violated NEPA by failing to provide adequate mitigation measures with respect to BASH in connection with development of the OLF at Site C. Pltfs' Mtn. at 59. In their attempt to demonstrate why the Court should find that the Navy was required to fully develop and adopt a BASH Plan during the NEPA process, Plaintiffs rely on two cases from the Ninth Circuit; National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001), and Friends of the Earth v. Hall, 693 F. Supp. 904 (W.D. Wash. 1988). As we now explain, neither case supports Plaintiffs' position.

National Parks holds that, in the context of determining whether an EIS is required, "an

agency is not required to develop a complete mitigation plan," 241 F.3d at 734. Rather "the proposed mitigation measures be 'developed to a reasonable degree.'" Id. That is exactly what the Navy did - it prepared an extensive BASH Analysis, Ex. 4 to United States' Opp. to P.I., including an analysis of possible mitigation measures. The Navy was in the process of beginning to develop a complete mitigation plan, including a radar study, when this Court effectively halted this activity by issuing a preliminary injunction in this case. By faulting the Navy for failing to augment its BASH analyses while at the same time seeking (and obtaining) an injunction prohibiting that very activity, Plaintiffs are preventing the Navy from conducting the very analyses that Plaintiffs argue are required by NEPA.

Plaintiffs' reliance on Friends of the Earth fares no better. Friends of the Earth involved a challenge to a monitoring plan which was required to resolve uncertainties and evaluate risk concerning the entire project. In contrast, the BASH Plan to be developed here is not designed to resolve uncertainties over the OLF "project" as a whole, but rather it is intended to mitigate one particular impact at the site.

In the final analysis in evaluating Plaintiffs' challenge to the adequacy of the Navy's mitigation measures, this Court should nonetheless follow the Supreme Court's direction on this matter. The Supreme Court has held that while the omission of a reasonably complete discussion of possible mitigation measures would undermine the "'action-forcing' function of NEPA," "a complete mitigation plan" does not have to be "actually formulated and adopted" during the NEPA process. Methow Valley, 490 U.S. at 352-53. The United States agrees that there should be such a "reasonably complete discussion of possible mitigation measures" for the OLF; however, this does not amount to a requirement that an agency complete and adopt fully developed mitigation plans during the NEPA process. Methow Valley, 490 U.S. at 352-53 ("[I]t would be inconsistent with NEPA's reliance on procedural mechanisms . . . to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can

act.").

As the Plaintiffs acknowledge on page 61 on their brief, the Navy is committed to developing a BASH Plan to minimize the potential for bird strikes. *See* 68 Fed. Reg. 53,356. In fact, the Navy would be well on the way towards completing that BASH Plan, had it not been for the injunction issued by this Court. Further, the FEIS identifies the procedures that may be implemented at the OLF site to minimize the overall BASH risk. FEIS p. 12-147 to 12-149. The Plaintiffs' position that the Navy was required to prepare a BASH Plan prior to the ROD would, if accepted, have been unreasonable because it would have required the Navy to prepare a BASH Plan with respect to all of the alternatives. Similarly, Plaintiffs' argument, if taken to its logical conclusion, would actually require the Navy to fully develop and adopt mitigation plans for all resources for all alternatives, which is simply not required by NEPA. As such, the United States is entitled to summary judgment on this claim.

5. Plaintiff' Have Not Shown That The Methodology Employed by the Navy for its Wetlands Analysis Was Inappropriate

The Navy's screening methodology for wetlands was entirely appropriate, as discussed in the United States' Mtn. for S.J., at 46-49. While Plaintiffs assert that "[i]t is now clear that the Navy failed to use an accurate and appropriate methodology for determining the presence of wetlands. . ." they fail to explain to whom such a determination is so clear. Pltfs' Mtn. at 61. Because the Navy conducted an exceptionally thorough wetlands analysis in its review of OLF alternative locations, and applied a wetlands screening methodology which included a full arsenal of analytical tools, the Navy's wetlands analysis fully complied with NEPA.

Further, while it is true, as Plaintiffs explain, that the OLF Siting Study, at page 2-2, stated that avoidance of wetlands was one of the screening criteria for identifying sites, contrary to Plaintiffs' continued assertions, the Navy does not believe there are any wetlands at Site C.

See United States' Mtn. for S.J., p. 49, n.16 (which also explains the need for a permit from the Corps of Engineers). Plaintiffs do not cite any record evidence to contradict that belief.

The Navy utilized entirely appropriate methodology in its wetlands analysis and Plaintiffs have failed to demonstrate otherwise. As such, the United States should also be granted summary judgment on this claim.

6. Plaintiffs Have Not Shown That The Navy Had An Obligation to Prepare a Supplemental Environmental Impact Statement ("SEIS")

An agency must prepare a supplement to a final EIS if: (i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502(9)(c)(1). In the Fourth Circuit, "substantial changes in a proposed project or 'significant' new circumstances or information will be found to be present when there is a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned." Hodges v. Abraham, 253 F. Supp. 2d 846, 853 (D. S.C. *2002), aff'd,* 300 F.3d 432 (4th Cir. 2002); *see also* Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 374 (1989). An agency's decision not to prepare a SEIS, after taking a "hard look" at a proposal's environmental consequences, must be upheld unless found to be arbitrary and capricious. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (*citing* Marsh, 490 U.S. at 374). Therefore, a SEIS is not required if the quantitative or qualitative environmental consequences of the proposed action are the same as evaluated by the original EIS.

Plaintiffs allege that the concept of "surge operations" constitutes a new circumstance that requires additional study and the preparation of a SEIS. Pltfs' Mtn. at 63. The term "surge operations" refers to any operation where an aircraft carrier must prepare and deploy prior to its scheduled deployment date. For example, operations in Afghanistan (Enduring Freedom) and in

Iraq (Iraqi Freedom) were considered "surge operations." The FEIS cited, as one reason for establishing the new OLF, the potential problem that "[d]uring these surge periods, existing facilities do not have the capacity to meet the Atlantic Fleet's FCLP requirements efficiently." FEIS at ES-4. Thus, to address future "surge" needs, the Navy embarked on a new operational construct, called the Fleet Response Plan ("FRP").[21]

Plaintiffs nonetheless allege that the Navy must "at a minimum" prepare a "SEIS to address the seriously different picture of these adverse environmental effects." Pltfs' Mtn. at 63. This claim is not sustainable because Plaintiffs neither specify what adverse environmental effects "surge operations" may have, nor explain how a "surge operation," using the same flight patterns thoroughly examined in the FEIS, would qualify as a "seriously different" activity from

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[21] Plaintiffs mischaracterize Cecchini's deposition testimony regarding the FRP and "surge operations" to support their allegations. Pltfs' Mtn. at 63. While the United States maintains that the Court should strike this deposition, should the Court be inclined to consider it, it should also consider Mr. Cecchini's actual deposition testimony. Mr. Cecchini did not say, as Plaintiffs allege, that "surge" was a "significant change" in the Navy's practice (concerning FCLP operations). Rather, in answer to the question "was surge a dramatic change in the way the Navy was thinking about and following through with respect to its training operations?," Mr. Cecchini responded:

> From my perspective it was a significant change in the typical way that squadrons had what we call worked up prior to deployment. Under the old regime, a squadron would go to sea for six months and come back and have a lot of down time and then start working up again over an 18-month cycle to go back out to sea.
>
> Surge is a revolutionary concept in that when those squadrons come back from deployment, they never go into a real low rate of steady – low state of readiness. They always maintain some state of readiness that on a rather short notice we could get them ready to go back out on the carrier again.

Cecchini Deposition, p. 125, lines 8-21. FEIS p. 1-32 to 1-33 Contrary to Plaintiffs' suggestion, Mr. Cecchini did not imply that the FRP would alter the extensive analysis done for the FEIS and specifically stated that the introduction of "surge operations" would not increase the projected number of FCLP operations to be flown at the new OLF. Cecchini Deposition, p. 126, lines 6-10. FEIS p.1-33.

that evaluated in the EIS.[22]

The Navy considered the implications of potential "surge operations" in the FEIS, stating that "[t]he intensity, duration, and timing of surge operations are impossible to predict." FEIS at p. ES-4 and p. 1-33. *See also* FEIS Section 4 at p.4-10. In the event of a "surge," the only change is a temporary period of higher operational tempo, followed immediately by a corresponding decrease in operations. FEIS, p.2-45; Zortman Declaration at 23. A temporary (and hypothetical) increase of FCLPs does not result in a "seriously different picture" from the environmental impact previously analyzed in the FEIS (as it would necessarily be followed by a corresponding decrease in operations). *See* Clinch Coalition v. Damon, 316 F. Supp. 2d 364, 376-77 (W.D. VA 2004) (holding that a 9.7% increase in sediment yield did not require a supplemental EA). Thus, there is nothing about surge operations that requires the Navy to prepare a SEIS, and thus, the Navy's determination not to prepare a SEIS is neither arbitrary nor capricious.

7. Plaintiffs Have Not Demonstrated That The Navy Failed To Fully Comply with the Coastal Zone Management Act

Plaintiffs allege that the Navy violated the CZMA because it failed to make a consistency determination regarding the Beaufort Land Use Plan.[23] Pltfs' Mtn. at 64. However, Plaintiffs

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[22] At Pltfs' Mtn. at 63, Plaintiffs suggest that "[t]he Navy anticipates that the FCLP profile under "surge" conditions will be radically different than under routine conditions. . ." Id. (*citing* the FEIS (p. ES-4)). Even if this concept is "radically different than under routine conditions," that difference pertains to the training cycle of the squadrons, not its potential impact on the environment.

[23] Plaintiffs have spent only one sentence discussing, in footnote 52 on page 64 of Pltfs' Mtn., the holding in City of Sausalito v. O'Neill, 2004 WL 2348385 (9th Cir. (Cal.) October 20, 2004), which was provided to the Court by the United States. Notice of Supplemental Authority, filed October 26, 2004. This is not surprising; as explained by the United States in its Mtn. for S.J. at 56-57, that holding is not controlling and distinguishable. Further, the Department of Justice sought an extension of time, until December 20, 2004, for filing a petition for rehearing on behalf of the federal defendants in the Sausalito case. The Department intends to seek

continue to express a basic misunderstanding of the coordination responsibilities under the CZMA. As relevant here, Section 307(c) of the CZMA provides:

> (1) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the *enforceable policies of approved State management programs* . . . . (C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency . . . at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule. (Emphasis added).

Essentially, in making such a determination the federal agency must find that its activity is consistent to the maximum extent practicable with the enforceable policies of the state's coastal management program ("CMP"). If the coastal state concurs with the consistency determination, then the federal agency has fulfilled its coordination responsibilities under the CZMA. 16 U.S.C. § 1456(c)(1)(A). There is simply no requirement in the CZMA that a federal agency "assess and determine that its proposed action is consistent with the affected county's land use plan" as Plaintiffs allege. Pltfs' Mtn. at 64.

On July 31, 2002, the Navy filed a consistency determination with the State of North Carolina's Division of Coastal Management ("DCM"), pursuant to the CZMA, 16 U.S.C. §§ 1451-1465, 1456(c)(1), concerning its decision to introduce the Super Hornet to the East Coast, including its plans for an OLF at one of six potential sites in coastal North Carolina, including Washington County. FEIS p. 14-5 and Section 12-3 at pp. 12-48 to 12-93, AR 046780 to AR 046782. On October 7, 2002, the DCM informed the Navy that it did NOT disagree with the Navy's consistency determination (emphasis added) (FEIS at p.14-5 and Section 12-3). By not disagreeing with the Navy's consistency determination, the State issued a "concurrence," pursuant to 15 C.F.R. § 930.41. Once a coastal state concurs with the consistency determination,

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rehearing on the CZMA standing issue.

the federal agency has fulfilled its coordination responsibilities under the CZMA. 16 U.S.C. § 1456(c)(1)(A); 15 C.F.R. § 930.41(c).

Plaintiffs nonetheless argue that because "the Navy has never made a determination of consistency with the Beaufort land use plan . . . the Navy may not proceed with its Site C OLF. . ." Pltfs' Mtn. at 65.[24] This claim has no merit because, as explained above, the Navy filed a "consistency determination" with the State of North Carolina's DCM, pursuant to the CZMA, after reviewing North Carolina's Coastal Management Plan, and the State concurred. (FEIS Section 12.3). Once North Carolina concurred with the Navy's consistency determination, the Navy had no further CZMA obligation and may proceed with its activity. 15 C.F.R. § 930.41(c).

While the Navy referenced the Washington County land use plan and not the Beaufort County land use plan in its consistency determination, this is inconsequential for two reasons. First, North Carolina concurred with Navy's consistency determination. If the State thought the Navy's consistency determination was inadequate because it did not reference the Beaufort

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[24] Plaintiffs' discussion of the policies of the 1992 Beaufort County CAMA Land Use Plan Update and the citation to the Affidavit of Hood Richardson (Pltfs' Mtn. at 65) are irrelevant as explained above. Further, while the 1992 Beaufort Plan is the Plan most recently approved by NOAA, pursuant to 15 C.F.R. part 923, subpart H, the County's 1997 Plan supersedes the 1992 Plan and the 1997 Plan has not been approved by NOAA. Nonetheless, not all the policies of even the approved 1992 Beaufort Plan (attached to the United States Mtn. for S.J. as Exhibit 4), have been approved by NOAA. Those policies that have been approved are basically the same as those approved for Washington County's Plan. Moreover, the CZMA requires that state enforceable policies, including enforceable components of the local land use plans, be legally binding under state law, 16 U.S.C. § 1453 (6a), and that they be approved by NOAA to be used for federal consistency, 16 U.S.C. § 1455 (d), 1456. If a state policy, approved by NOAA, is later substantively changed/replaced, then the previous policy is no longer enforceable under state law and is not an enforceable policy of the NOAA-approved state CZMA program. The state would have to obtain NOAA approval of the new policy. Therefore, in addition to the other deficiencies in Plaintiffs' argument regarding the Beaufort Plan, as noted above and in the United States' Mtn. for S.J., it may also be that the 1992 Beaufort Plan policies are no longer enforceable policies under state law and for CZMA purposes.

County land use plan the State could have objected, pursuant to 15 C.F.R. § 930.43(b). By concurring with the Navy's determination, the State either did not consider it material or chose not to object, and instead concurred. Thus, for the Beaufort County land use plan to be an issue, the state DCM would have had to raise the matter during its review of Navy's consistency determination and prior to the state's concurrence. Plaintiffs cannot now seek to undo the State's concurrence. Second, the Navy did evaluate Washington County's land use plan and the enforceable policies of the Washington and Beaufort County plans are basically the same.[25] Thus, the Navy's CZMA analysis would not have been any different even if the Navy had specifically evaluated the 1992 Beaufort County land use plan, or referenced it along with the Washington County Plan.

Therefore, by submitting a consistency determination to the State and receiving the State's concurrence, the Navy has fully complied with the procedural and substantive requirements of the CZMA and NOAA's regulations and North Carolina's federally-approved CMP. In the event the Court does not grant the United States' Motion to Dismiss the County Plaintiffs' CZMA claim, the United States is entitled to summary judgment.

C. Plaintiffs Have Failed to Demonstrate that a Permanent Injunction Should be Issued

1. United States has Demonstrated Actual Success on the Merits and the Harms Weigh in the Navy's Favor

The United States has demonstrated that there are no genuine issues of material fact with respect to Plaintiffs' claims, that the United States has shown actual success on the merits of Plaintiffs' claims, and that the United States is entitled to summary judgment. As such, and coupled with the fact that the balance of harms tips strongly in the Navy's favor, Plaintiffs have

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[25] The Washington County Plan was submitted with the supplement to the AR on November 19, 2004 and the Beaufort County Plan was filed as Exhibit 4 to the United States' Mtn. for S.J.

no basis to continue to seek an injunction in this matter.

As discussed in more detail in the United States' Mtn. for S.J. at 58-70, even if this Court finds that the Navy has violated NEPA, there is no requirement that the Court issue an injunction. The Supreme Court has specifically held that even if a violation of NEPA has been found, that the District Court may craft a remedy that does not include a permanent injunction. Weinberger v. Romero-Barcelo, 456 U.S. 305, 317-320 (1982).

In the case at bar, even if the Navy had violated NEPA (which the United States denies), the Court could simply order the Navy to go back and re-work any portions of the EIS which the Court finds are deficient, while permitting the Navy to proceed with activities with no, or minimal, environmental impacts. This would reasonably balance the potential harm to the Plaintiffs and the environment with the legitimate needs of the Navy.

a. The Alleged Harms to Plaintiffs Can Not be Supported and the Denial of Plaintiffs' Request for a Permanent Injunction Will Not "Impermissibly Bias" the Administrative Process

Plaintiffs are accurate in their representation that the harms issue has been "extensively discussed" in prior filings and hearings in this matter, Pltfs' Mtn. at 66. Therefore, the United States incorporates by reference all of the arguments concerning balance of harms previously made in this case. In addition, the United States briefly responds below to each of the three categories of harm alleged by Plaintiffs.

Plaintiffs argue that the harm to the environment, the harm to the "Counties' fiscal position," as well as the so-called "bureaucratic steamroller" theory, all support a permanent injunction in this matter. Pltfs' Mtn. at 66-67. Plaintiffs are wrong on every argument.

i. Alleged Harm to the Environment From Denial of An Injunction Has Not Been Established

Plaintiffs have to establish that, in the absence of a permanent injunction, they would suffer irreparable harm. Hughes Network Sys. Inc. v. Interdigital Comm. Corp., 17 F.3d 691 (4th Cir. 1994); University of Texas v. Camenisch, 451 U.S. 390 (1981). This, in and of itself, should be the basis to deny the Plaintiffs' request for a permanent injunction, as the operation of the OLF was not scheduled to begin until 2007 at the earliest, *see* Declaration of Thomas R. Crabtree, para. 27, Exhibit 6 to United States' Opp. to P.I., and that date has been extended until at least February 2008 as a result of the injunction currently in place. Declaration of Rear Admiral Richard E. Cellon. Exhibit B to the United States' Motion to Stay. The impact to the environment resulting from land acquisition and even construction is minimal and the potential impact to the Refuge and the migratory birds would not take place - if at all - until the OLF is operational.

ii. Alleged Harm to the Counties' Fiscal Position From Denial of An Injunction Has Not Been Established

Plaintiffs state that the "Counties' fiscal position, through loss of tax revenue, and their future economic viability through threats to eco-tourism, will follow unless the Navy is permanently enjoined." Pltfs' Mtn. at 67. However, the potential revenue lost as a result of decreased "eco-tourism" and removal of land from tax rolls are speculative at best. In addition, their alleged harm is monetary in nature, and monetary harms do not typically establish irreparable harm. *See* Town of Kure Beack v. United States, 168 Ct. Cl. 597, 600 (1964); Public Water Supply Dist. v. United States, 135 F. Supp. 887, 891 (Ct. Cl. 1955). Further, the potential loss of "eco-tourism" revenue, even if not speculative, is not actual and imminent since it will not occur, if it does at all, until the OLF is operational, which will not occur until February 2008 at the earliest.

iii. Alleged Bureaucratic Steamroller Harm From Denial of An Injunction Had Not Been Established

Plaintiffs continue to assert that "without an injunction the bureaucratic steamroller will simply roll on in defiance of the Navy's NEPA obligations" and cite to this Court's Order on the preliminary injunction ("Once the land acquisition, site preparation, and construction on the OLF begin, the Navy's impartiality will be compromised, and it will be committed to proceeding with the project."). Pltfs' Mtn. at 67, *citing* Washington County, *et al.* v. United States Dep't of the Navy, *et al.*, 317 F. Supp. 2d 626, 633 (E.D.N.C. 2004). However, in addition to the arguments previously made on this point, the United States points out that that theory also fails because it suggests a subjective inquiry into the state of mind of the agency decisionmakers, instead of an objective inquiry into the real environmental risks, as the CEQ 's NEPA regulations instead require. *See* 40 C.F.R. § 1506.1(a).

b. The Harm to the Navy and the Nation Will Be Significant if a Permanent Injunction is Granted

Plaintiffs continue to minimize the harm that an injunction has, and will continue to have, on the Navy and the Nation. Pltfs' Mtn. at 67 - 68. Plaintiffs fundamentally misunderstand what is at stake in this case, which the United States has again explained in its Mtn. for S.J. at 65 - 68, and its previous filing before this Court.

Plaintiffs' only new argument suggests that because Congress has recently cut some of the Navy's OLF funding for the 2005 budget, "the Navy will be unable to proceed with the construction of the OLF according to the schedules set forth by Rear Adm. Cellon." Pltfs' Mtn. at 68. This however, has nothing to do with the harm the Navy and the Nation as a whole continue to suffer as result of the injunction, harms that will be escalated through the granting of a permanent injunction. The balance of hardship tips decisively in favor of denying Plaintiffs' request for a permanent injunction. Because a permanent injunction may last for a longer period of time, the harm to the Navy and the Nation as a whole would be even greater in a permanent

injunction than it has been in connection with the preliminary injunction.

A recent decision from the district court in Hawaii is strikingly similar to the facts of this case. While this decision is not binding on this Court, and is not published at this time, it is instructive. In Ilio'Ulaokalani Coalition v. Rumsfeld, CV No. 04-00502 DAE BMK (Dist. HI, Nov. 5, 2004), Order attached hereto as Exhibit 1, plaintiffs challenged the Army's NEPA analysis for the initial phase of its program to transform Army units in Hawaii, Alaska, and the continental United States to more efficient and strategically armed units, as directed by the Secretary of Army and the Chief of Staff. Claiming that the Army's construction activities at a Hawaii Army base could irreparably harm the environment (in particular cultural resources), plaintiffs sought a preliminary injunction "to prevent the transformation project from gaining 'irreversible momentum.'" Order at 15. In other words, a sort of "bureaucratic steamroller" argument was advanced. In finding that some activities could proceed without harm to the environment, based upon the Army's slow pace and mitigation plans, the court considered plaintiffs' "irreversible momentum" argument and found it "exaggerated and unpersuasive." Order at 16. The court noted that the Army was only intending to spend approximately $13 million, which amounted to less than 3% of the projected overall costs before the case would be resolved on the merits, most of which were associated with the planning phase of the project. The court, in considering the balance of hardships, explained:

> Unlike Plaintiffs who casually disregard the Army's contention that national defense concerns are at issue while urging the court do the same, the court finds national security concerns to be an issue of paramount importance that tips the balance of hardships decidedly in favor of Defendants. The harm to national defense is an important factor to be weighed is assessing the propriety of Plaintiffs' request for preliminary injunction. State of Wisconsin v. Weinberger, 745 F.2d 412, 427 (7th Cir. 1984). Plaintiffs' assertions that these concerns are too speculative and not imminent are plainly unfathomable. The harm to the Army and its efforts in the Global war on Terrorism from a preliminary injunction are both demonstrative and severe. Plaintiffs wish to ignore the fact that our nation is

at war.

Order at 17. As such, the court denied the plaintiffs' request for injunctive relief. Similarly, this Court should dismiss Plaintiffs' exaggerated and misplaced "bureaucratic steamroller" argument, find that the balance the harms weighs in the Navy's favor, and upon considering the public interest described below, deny Plaintiffs' request for a permanent injunction.

2. The Public Interest Favors Denying the Request for a Permanent Injunction

Plaintiffs maintain that the public interest will be enhanced by the entry of a permanent injunction. Pltfs' Mtn. at 68-69. In support of their position, Plaintiffs cite to Western North Carolina Alliance v. North Carolina Dep't of Transp., 312 F. Supp. 2d 765 (E.D.N.C. 2003), Sierra Club v. Marsh, 872 F.2d 497 (1st Cir. 1989), and Fund for Animals v. Clark, 27 F. Supp. 2d 8, 15 (D.D.C. 1998). Plaintiffs maintain that these cases stand for the proposition that, in NEPA compliance cases such as this, the public interest essentially weighs in favor of a permanent injunction because NEPA embodies the public policy that agencies consider the environmental impacts of their action. To the extent Plaintiffs rely on these cases for the principle that environmental values are the sole criteria under which the propriety of injunctive relief may be assessed, their reliance is again ill-founded. While a general interest in enforcement of the laws is certainly in the public interest, none of the cases cited by Plaintiffs suggest that the totality of the circumstances should be ignored in consideration of a request for injunctive relief.

The Supreme Court has explained that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 498 (2001) ("To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms."); *see also*

Cont'l Group, Inc. v. Amoco Chems. Corp., 614 F.2d 351, 358 (3d Cir. 1980); id. at 358 n.12 ("It is not suggested that the vindication of principles of law is not in the public interest, but only that this is not what has been meant in holding that the district courts should consider the public interest when that factor is relevant to the grant or denial of interlocutory relief."). When these principles are applied to this case, it is clear the public interest weighs against issuing a preliminary injunction.

The heart of the public interest component in this case, based on the standards for a permanent injunction, is that of national security and military preparedness, not whether the Navy has allegedly failed to comply with NEPA, which Plaintiffs equate to a violation of the "public trust" and the public interest. Pltfs' Mtn. at 69. A review of the United States' arguments and the declarations of very high level officials within the Navy demonstrate that the public interest factor, when properly considered, weighs against issuance of a permanent injunction.

3. If an Injunction is Issued, it Should Be Narrowly Tailored

If the Court decides that some type of permanent injunction should issue, the Court should narrowly draft the terms of that injunction. For example, although the crux of Plaintiffs' argument is that the Navy selected the location of the OLF in violation of NEPA, the relief they ask for is actually much broader than that. They have asked that this Court issue an order "vacating the ROD and permanently enjoining further actions by the Navy to implement the ROD, including specifically construction of an OLF at Site C. . . ." Pltfs' Mtn. at 70. However, vacating the ROD or permanently enjoining actions carrying out the ROD would have *much broader application* than even the preliminary injunction. The preliminary injunction only enjoined actions in furtherance of building the OLF. Vacating the ROD, however, would prohibit the Navy from homebasing the F/A-18 Super Hornets on the East Coast. As pointed out in the Declaration of Admiral John Nathman, attached to the Navy's Mtn. for S.J. as Exhibit 1, such an injunction would have catastrophic consequences during a time of actual combat

operations. Therefore, the Court must carefully craft the remedy to avoid these immediate and irreparable harms to military operations.

Furthermore, even if the Court decides to issue a permanent injunction concerning the OLF (but not homebasing), the Court should re-weigh the balance of harms between the parties and fashion a remedy that is less restrictive than the Preliminary Injunction. For example, the Court previously said that issuing a "preliminary injunction would not impose too excessive an *interim burden* on the Navy or on the public." April 20, 2004 Order on Preliminary Injunction, at 18 (emphasis added). Although the United States disagrees with this statement, it is clear that the burden of a permanent injunction is more than merely an "interim burden" on the Navy and the public. Therefore, the Court should consider whether there are some intermediate steps that the Navy could take in furtherance of the OLF that would adequately protect the Plaintiffs and the environment, without unduly tying the Navy's hands, while the Navy reconsidered its decision concerning the OLF under NEPA.

Put another way, instead of issuing a broad injunction prohibiting the Navy from "directly or indirectly taking any further activity associated with constructing an OLF in Washington and Beaufort Counties," Washington County, 317 F. Supp. 2d at 637, the United States asks that the Court spell out the specific actions that the Navy is prohibited from taking. For example, the Court could prohibit the actual construction of the OLF, the issuance of a construction contract for the OLF and/or the involuntary taking of land outside the "core area." These discrete prohibitions would clearly let the Navy know what it could (and could not) do during the time in which it was re-evaluating its decision under NEPA (if such re-evaluation is deemed necessary, which is denied by the Navy). Furthermore, the injunction should make clear that it only applies until such time as the Navy has completed its additional NEPA analysis and issued a new ROD, since the Navy would have then cured the defects in the NEPA process (if any).

There are several examples demonstrating why a permanent injunction that is as broad as

the preliminary injunction would cause irreparable harm to the Navy, and in fact, perhaps make it impossible for the Navy to complete the NEPA process. First, the Plaintiffs have complained about the fact that no official wetlands delineation was done at Site C during the NEPA process. The United States, on the other hand, contends that no official wetlands delineation needs to be done, if at all, until after the site is selected, as part of the 404 Permit process. However, the Navy may wish, in its discretion, to conduct such a wetlands delineation at Site C or discuss the matter further with the Corps of Engineers – something that appears to be prohibited by the current injunction. Likewise, the Navy is prohibited from completing its BASH Plan at Site C because the current injunction prevents it from doing anything that "directly or indirectly" advances the project. Also, the Navy may wish to proceed with preparing its Integrated Natural Resources Management Plan, which will involve coordination with the F&WS and state resource agencies to effectively manage wildlife and other natural resources. 68 Fed. Reg. 53,356. Again, this is something that is prohibited under the current injunction. In fact, the Plaintiffs have even objected to the Navy entering into leases with the existing farmers (in connection with the property the Navy has already purchased) to allow them to continue farming, since the proposed leases include contingent language that would allow certain restrictions on the lease.

For all these reasons, if the Court issues a permanent injunction, it should be narrowly tailored and the injunction should end at such time as the Navy had corrected the deficiencies identified by the Court (if any) in a Supplemental EIS.

III. Conclusion

The United States has demonstrated that there are no material issues of fact, that the Navy fully complied with NEPA and the CZMA, and that the United States is entitled to summary judgment with respect to all of Plaintiffs' claims. The United States respectfully moves this Court to grant it summary judgment and to deny Plaintiffs request for a permanent injunction.

Dated this 20th day of December, 2004.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, that on the 20th day of December, 2004, I served a true and correct copy of the "United States' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment" by Federal Express to counsel at the places and addresses below stated:

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